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Restricting Surrogacy to Married Couples: A Constitutional Problem? The Married-Parent Requirement in the Uniform Status of Children of Assisted Conception Act

By ANN MACLEAN MASSIE*

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Introduction

"If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹ With these much-quoted words, Justice William Brennan, writing the opinion of the Supreme Court in the 1971 case of *Eisenstadt v. Baird*,² set the stage for the debate over "procreative liberty"³: that complex of questions involved in defining the "fundamental right"⁴ to decide "whether to bear or beget a child." The Court's holding that the Equal Protection Clause of the Fourteenth Amendment forbids legal distinctions between the rights of married and single persons seeking access to contraception⁵ has since been used by both courts and commentators to support a spectrum of procreative liberties. These liberties range from court decisions granting broad parental rights to the fathers of illegitimate children⁶ to suggestions by some scholars that the "fundamental right" to decide "whether to bear or be-

1. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis in original).

2. 405 U.S. 438 (1971).

3. See, e.g., sources cited *infra* note 7.

4. See *infra* note 74 and accompanying text.

5. The Court had struck down a prohibition on the use of contraceptive devices by married couples six years earlier in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

6. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972) (invalidating an Illinois statute that automatically deprived unwed fathers of guardianship of their dependent children upon the death of the mother, whereas unwed mothers would be entitled to a hearing upon any state challenge to their parental rights); *Caban v. Mohammed*, 441 U.S. 380 (1979) (holding that the natural father of an illegitimate child who had maintained a close relationship with the child had right equal to the mother's to block a proposed adoption). But see *Lehr v. Robertson*, 463 U.S. 248 (1983) (upholding a New York statute providing all mothers but only certain classes of "putative fathers" with an adoption veto power). The Court distinguished *Caban* from *Lehr* on the grounds that *Lehr* had never supported the child or entered his name in the state's "putative father registry," which would have entitled him to notice of the adoption proceeding.

get a child" must necessarily include access to the latest reproductive technologies.⁷ Some commentators assert that the equal protection principles enunciated in *Eisenstadt* and other cases dictate that any legislative attempt to restrict such access according to marital status would be constitutionally impermissible.⁸

In August 1988 the National Conference of Commissioners on Uniform State Laws adopted the Uniform Status of Children of Assisted Conception Act (the Act), which the House of Delegates of the American Bar Association subsequently adopted at its meeting in February 1989.⁹ The purpose of the Act is to define the legal status of children conceived through the use of extraordinary procedures and arrange-

7. The most vocal proponent of this view has been Professor John A. Robertson. See Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939 (1986) [hereinafter Robertson, *Embryos*]; Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983) [hereinafter Robertson, *Procreative Liberty*]; Robertson, *Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction*, 16 LAW, MED. & HEALTH CARE 18 (1988); accord, Gostin, *A Civil Liberties Analysis of Surrogacy Arrangements*, 16 LAW, MED. & HEALTH CARE 7 (1988); see also Ethics Committee of the American Fertility Society, *Ethical Considerations of the New Reproductive Technologies*, 46:3 FERTILITY AND STERILITY 2S (1986) [hereinafter Am. Fertility Soc'y, *Ethical Considerations*] ("[T]here is good reason to expect the courts to recognize a constitutional right to procreate by noncoital and donor-assisted means."). Most commentators, however, think that access to surrogacy would not be upheld as a constitutionally protected right, particularly when payment of a fee to the surrogate is involved. M. FIELD, *SURROGATE MOTHERHOOD* 68 (1988); Annas, *The Impact of Medical Technology on the Pregnant Woman's Right to Privacy*, 13 AM. J.L. & MED. 213, 222 (1987) ("[A]lthough a general ban on the use of surrogacy might be successfully challenged (as interfering with a couple's constitutional right to procreate without a compelling state interest), a ban on commercial surrogacy . . . would likely survive constitutional challenge."); Capron & Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, 16 LAW, MED. & HEALTH CARE 34 (1988); Holder, *Surrogate Motherhood and the Best Interests of Children*, 16 LAW, MED. & HEALTH CARE 51, 53 (1988) ("It seems that the right to procreate is limited to the right to make private choices, and does not include the right to make contracts about reproduction and to ask the legal system to recognize or enforce them.").

8. Robertson, *Procreative Liberty*, *supra* note 7, at 432-36; Robertson, *Embryos*, *supra* note 7, at 962-64; Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669 (1985); see also Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1 (1981) (arguing that access to artificial insemination by single women could not constitutionally be forbidden).

9. Robinson & Kurtz, *Uniform Status of Children of Assisted Conception Act: A View from the Drafting Committee*, 13 NOVA L. REV. 491 (1989). Robert C. Robinson was Chairman of the Drafting Committee for the Uniform Act; Paul M. Kurtz was its Reporter. Their article is largely replicated in the Prefatory Note to the statute. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, 9B U.L.A. 102-17 (Supp. 1988) [hereinafter UNIF. CONCEPTION ACT] (reprinted in the Appendix of this Article).

ments,¹⁰ specifically, artificial insemination by donor (AID),¹¹ *in vitro* fertilization (IVF),¹² and surrogate motherhood agreements.¹³ With respect to surrogacy in particular, the Act remains neutral on the question of its appropriateness as a means of helping infertile couples to achieve parenthood, but it does propose two alternative provisions, depending upon whether a state wishes to recognize surrogacy contracts as a legal means of procreation. One alternative makes all such agreements unenforceable.¹⁴ The other sanctions a court-supervised agreement that becomes specifically enforceable 180 days after the surrogate's last artificial insemination with the intended father's sperm, provided she has not exercised her right to recant prior to that date.¹⁵

Under the provisions of the Act, the "intended parents" in a surrogacy arrangement must be "a man and woman, married to each other."¹⁶ This requirement arguably runs into two obstacles stemming from Justice Brennan's declaration in *Eisenstadt v. Baird*.¹⁷ The first is the contention that any legal means of procreation is part of the "right of privacy" protected by the Due Process Clause of the Fourteenth Amend-

10. The development and increasing use of noncoital reproductive techniques is by now well chronicled. See generally OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, OTA-BA-358, *INFERTILITY: MEDICAL AND SOCIAL CHOICES*, (1988) [hereinafter OTA, *INFERTILITY*]. In 1988, the Office of Technology Assessment estimated that two to three million American couples wanted to have a baby but required medical help to do so. *Id.* at 3. The OTA estimated that as of 1982, 2.4 million married couples (approximately 8.5% of those with wives aged 15 to 44) and an unknown number of unmarried couples were affected by infertility. *Id.* Although available information indicated no increase in the rate of infertility except in the group of married couples with wives age 20 to 24, there had been a dramatic increase in the number of visits to physicians' offices for infertility services in recent years (600,000 in 1968, compared to about 1.6 million in 1984, with a particularly sharp increase after 1980). *Id.* at 4-5. For an overview of the medical possibilities and social and legal issues arising from them, see Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465 (1983). See also Am. Fertility Soc'y, *Ethical Considerations*, *supra* note 7.

11. For an overview of the use of artificial insemination in the United States, see generally OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, OTA-BP-BA-48, *ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES: SUMMARY OF A 1987 SURVEY—BACKGROUND PAPER* (1988). The OTA survey estimated that "172,000 women underwent artificial insemination in 1986-87, at an average cost of \$953, resulting in 35,000 births from artificial insemination by husband (AIH), and 30,000 births from artificial insemination by donor (AID)." *Id.* at 3. With respect to the legal and social issues involved, see Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. L. 331 (1980).

12. Robertson, *Embryos*, *supra* note 7, contains a thorough discussion of the social and legal issues surrounding IVF. See also OTA, *INFERTILITY*, *supra* note 10, at 250-55.

13. For excellent recent discussions of the problems and social issues presented by surrogacy, see M. FIELD, *supra* note 7; *Surrogate Motherhood: Politics and Privacy*, 16 LAW, MED. & HEALTH CARE (1988) (a compendium of articles, some of which are cited *supra* note 7).

14. UNIF. CONCEPTION ACT, *supra* note 9, § 5, Alternative B.

15. *Id.* §§ 5-9, Alternative A.

16. UNIF. CONCEPTION ACT, *supra* note 9, § 1.

17. 405 U.S. 438 (1972).

ment, and thus may only be regulated by narrowly tailored rules designed to serve compelling state interests.¹⁸ The language of *Eisenstadt* suggests that the state has no compelling interest in limiting procreative rights to married couples.¹⁹ In the views of a number of commentators, the result can be no different simply because procreation is achieved through surrogacy rather than in some other way.²⁰

The second obstacle is an equal protection argument that the state cannot legitimately distinguish between married and unmarried persons in defining those to whom this new means of procreation will be available.²¹ This argument is sharpened by an examination of public policies with respect to other state-sanctioned means of becoming a parent. All states permit adoption by single persons.²² Furthermore, while a majority of states have statutes regulating AID, none of them prohibits access to this technology on the part of single women, and a few explicitly contemplate such a possibility.²³ The result is that a single woman who wishes to bear and raise a child genetically related to her may do so; but under the proposed Act, even with the advent of legalized surrogacy, a single man would not be able to beget and raise a child genetically related to him. This fact raises a potential issue of gender discrimination. The distinction that the Act would draw between married and unmarried but cohabiting couples is also questionable.

This Article argues that the proposed Uniform Status of Children of Assisted Conception Act is not constitutionally infirm. Rather, the model legislation takes a cautious approach to a relatively recent and still extremely controversial means of achieving parenthood—a means that may or may not turn out to have beneficial social consequences. Under these circumstances, state legislatures that approve limited use of surrogacy agreements would be acting entirely reasonably in adopting the relatively strict regulatory scheme contemplated by the Act. The restricted access to married couples actually presents a paradigm for examining the validity of general legislative circumspection when legalized surrogacy is concerned. This focus is useful because the married-parent requirement seems likely to be challenged and because the requirement seems particularly vulnerable to constitutional attack.

This Article concludes that legislatures are entitled to limit access to legalized surrogacy agreements according to their perceptions of the best

18. *Id.* at 453-54.

19. *Id.* at 452-53.

20. See *supra* note 8 and accompanying text.

21. *Id.*

22. See *infra* notes 177-78 and accompanying text.

23. See *infra* notes 189-93 and accompanying text.

interests of the children resulting from those agreements. The state's determination constitutes a governmental interest sufficiently compelling to overcome any counterarguments from unmarried persons desiring access to the technology. Should surrogacy turn out to be a highly satisfactory social solution to the problems of persons desiring parentage but unable to achieve it on their own, legislatures might then decide to re-examine their earlier positions and make access to enforceable surrogacy agreements available to unmarried as well as married persons. Until such time, however, a state legislature's choice is not limited by existing principles of constitutional law.

I. The Uniform Status of Children of Assisted Conception Act

A. Purpose and Scope

The Uniform Status of Children of Assisted Conception Act²⁴ now stands ready for consideration by state legislatures.²⁵ The Drafting Com-

24. For a copy of the Act, see Appendix, *infra*.

25. The National Conference of Commissioners on Uniform State Laws was organized in 1892 "to promote uniformity in state law on all subjects where uniformity is desirable and practicable . . . by voluntary action of each state government." NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1988-89 REFERENCE BOOK 2 (1988). The Conference consists of Commissioners from each state, the District of Columbia, and Puerto Rico. Its Standing Committee on Scope and Program receives proposals for subject matter of Uniform Acts and makes recommendations to the Executive Committee. Once the Conference accepts a subject, a special committee is appointed from among the Commissioners to draft a proposed Act. Drafts must be discussed, section by section, by the full Conference at no fewer than two annual meetings before the Conference can take a vote of states to recommend the draft as a Uniform Act to their respective legislatures. *Id.* at 2-4.

To date, the Conference has drafted over two hundred uniform laws, which have met with varying degrees of state acceptance. *Id.* at 3. Most notable, of course, has been the Uniform Commercial Code, but other Uniform Acts have been widely accepted as well. For example, the Uniform Parentage Act, which constitutes the basic legal framework for the operation of the Act under consideration here, is currently in force, with some modifications, in 18 states. See UNIF. PARENTAGE ACT, 9B U.L.A. 287 (1973) (Table of Jurisdictions, Supp. 1991). The Conference appointed the Drafting Committee for the Uniform Status of Children of Assisted Conception Act "to draft an act, a child oriented act, to provide order and design that would inure to the benefit of those children who have been born as a result of . . . medical miracles." Robinson & Kurtz, *supra* note 9, at 492. The Committee completed its work in August 1988, when the full Conference adopted the proposed Act appended to this Article.

An important point to note in assessing any Uniform Act is the degree of care and expertise that have been brought to bear on the proposed statute's formation. Also important to consider is the extent of analysis and debate to which the proposed statute has been subjected during its journey through the National Conference of Commissioners on Uniform State Laws and, as here, the ABA House of Delegates. The Drafting Committee's work has included much information gathering, as well as extensive deliberations over constitutional requirements, actual societal practices, and desirable social policy. In the words of the chairperson and the reporter of this Uniform Act, "Some provisions may appear arbitrary and seemingly inequitable at first, but not one word in this Act was casually drafted." *Id.* at 493. One thus

mittee's original charge was "to effect the security and well-being of children born and living in our midst as a result of assisted conception,"²⁶ including the "use of such limited and monitored surrogacy procedures as might be necessary to accomplish" the Committee's general mandate.²⁷ Consonant with its limited purpose, the Act is quite narrow in scope. It does not purport to be a thorough regulation of those practices (AID, IVF, and surrogacy) underlying its operation; rather, its primary aim is to clarify the *legal status of children* resulting from such "assisted conception."²⁸ The Act's narrowness and brevity represent deliberate choices made to serve the best interests of children and thereby also to strengthen the Act's appeal to state legislators.²⁹ Its primary protection lies in the stipulation that a child whose parentage is determined pursuant to the Act's provisions is the child only of his or her parents as determined thereunder.³⁰ Absent superseding subsequent events changing the

can expect this draft to receive serious consideration from state legislatures attempting to deal with the often confusing quandaries posed by increasing contemporary use of new reproductive procedures and arrangements.

North Dakota has already adopted the Act, with minor variations, although the legislature chose the Act's alternative provisions voiding surrogacy contracts. N.D. CENT. CODE §§ 14-18-01 to 14-18-07 (1989). A bill incorporating a number of provisions similar to those of the Act, including legalized surrogacy, was introduced into the Virginia legislature in 1990. Va. Senate Bill No. 14 (Jan. 10, 1990). The bill was set over to the next session and eventually defeated. The legislature did adopt an almost identical enactment that recognizes court-supervised surrogacy but forbids compensation beyond reasonable medical expenses and ancillary costs. The act will take effect July 1, 1993. 1991 Va. Acts Ch. 600 (Mar. 25, 1991); *see also* Report of the Joint Subcommittee on Surrogate Motherhood, Senate Document No. 10, at 20 (1991) ("The title of the Act, 'Status of Children of Assisted Conception,' was chosen to indicate some consistency with the proposal of the same name as drafted by the National Conference of Commissioners on Uniform State Laws. However, the Virginia proposal differs substantially from the proposed Uniform Act.") Unlike the Uniform Act, the Virginia law makes provision for validating surrogacy agreements that have not received prior court approval.

26. Robinson & Kurtz, *supra* note 9, at 492.

27. *Id.*

28. "Assisted conception" is defined by this statute as "a pregnancy resulting from (i) fertilizing an egg of a woman with sperm of a man by means other than sexual intercourse or (ii) implanting an embryo, but the term does not include the pregnancy of a wife resulting from fertilizing her egg with sperm of her husband." UNIF. CONCEPTION ACT, *supra* note 9, § 1(1). In other words, "assisted conception" includes artificial insemination, *in vitro* fertilization (when the respective providers of the sperm and egg are not husband and wife), and fertilization through sexual intercourse when the resulting embryo is transplanted into another woman's womb. In no event, however, does "assisted conception," as defined by this Act, include husband-wife procreation, even when that process is aided by technology; that situation is governed by otherwise relevant state law, such as the Uniform Parentage Act. UNIF. CONCEPTION ACT, *supra* note 9, § 1, comment.

29. Robinson & Kurtz, *supra* note 9, at 492.

30. UNIF. CONCEPTION ACT, *supra* note 9, § 10(a).

child's legal status,³¹ the parent-child relationships defined by the Act control for purposes of applying intestate succession and probate laws, and for determining the child's eligibility to participate in donative transfers defined by class relationships.³²

B. Surrogacy Provisions of the Act

The Act sets forth two alternative provisions, designated Alternatives A and B, regarding contracts pursuant to which a woman agrees to become a surrogate and relinquishes her rights and duties as parent of any child conceived through assisted conception. Alternative B summarily proclaims all such agreements void.³³ Alternative A³⁴ consists of sections 5 through 9 of the Act. This alternative recognizes surrogacy as a legitimate means of achieving parenthood in certain carefully delineated circumstances. The portion of the proposed statute addressing surrogacy is more specifically regulatory than its other sections. This characteristic reflects most acutely the Drafting Committee's impetus to

31. For example, other than in situations governed by surrogacy agreements, the Act provides that the husband of a woman who gives birth as the result of an assisted conception is the child's legal father, unless he commences an action within two years of learning of the child's birth. In such an action, the husband must also prove to the court's satisfaction that he did not consent to the assisted conception. The mother and child must be parties to the action. *Id.* § 3; *see also id.* § 3, comment (pointing out that this section's presumptive paternity "reflects a concern for the best interests of the children" and that the obligation is never on the child or the mother to prove the husband's paternity.) Moreover, the presumption can be rebutted only by the husband, not by someone acting on his behalf, such as a guardian, administrator, or executor. *Id.* The provision applies even if the marriage is later annulled or declared invalid. *Id.* § 3.

32. *Id.* § 10(b) & comment. The comment points out that this section parallels similar provisions in adoption statutes.

33. *Id.* § 5, Alternative B. This section further provides that a woman who has agreed to become a surrogate is the mother of a resulting child, and her husband, if a party to the agreement, is the father. If the woman's husband was not a party to the original agreement, or if she is unmarried, paternity is determined by otherwise relevant state law. The Drafting Committee thought it was important for states rejecting surrogacy to enact these provisions because various individuals are likely to attempt such arrangements, regardless of legal restraints, and the resulting children need a specified means for determining their status. *Id.* § 5, Alternative B & comment. North Dakota has enacted this provision. *See* N.D. CENT. CODE §§ 14-18-01 to 14-18-07 (1989). Note that in the unfortunate circumstance in those situations when paternity is governed by existing state law, a custody battle could still develop between the mother and the biological father. *See, e.g., In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988) and the trial court order on remand, 225 N.J. Super. 267, 542 A.2d 52 (1988) (when a natural father and his wife sued to enforce a surrogacy contract with the natural mother, the court held that surrogacy contracts were unenforceable because they conflicted with the state's adoption laws and were contrary to public policy. The best interests of the child justified a custody award to the natural father and his wife; however, the natural mother was entitled to visitation rights).

34. Alternative A will be the subject matter of all future references in this Article, unless otherwise specified.

protect the "rights, security and well-being" of affected children and the concomitant "great urgency . . . to provide a child with two legal parents."³⁵

The scheme for legalized surrogacy attempts to protect the rights of all parties and to maximize the chances for a successful outcome through means of close court supervision over all surrogacy agreements and a requirement for psychological counseling of the intended parents, of the surrogate, and of the surrogate's husband, if she is married.

To be specifically enforceable, a surrogacy agreement must include "intended parents," defined as "a man and woman, married to each other, who enter into an agreement under this [Act] providing that they will be the parents of a child born to a surrogate through assisted conception using egg or sperm of one or both of the intended parents."³⁶ The "surrogate" is "an adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents."³⁷ Thus, not only must the intended parents be a married couple, but at least one of them must supply genetic material for the resulting child.

Another primary restriction on the use of surrogacy as a technique for procreation lies in the requirement for a judicial finding that "the intended mother is unable to bear a child or is unable to do so without unreasonable risk to an unborn child or to the physical or mental health of the intended mother or child, and the finding is supported by medical evidence"³⁸

When these circumstances exist, the intended parents, the surrogate, and the surrogate's husband, who must be included if she is married, may enter into a written surrogacy agreement.³⁹ The agreement must receive court approval prior to any conception. The prescribed judicial procedure includes a number of safeguards designed to avoid the pitfalls inherent in surrogacy arrangements: appointment of a guardian *ad litem* to represent the interests of the future child;⁴⁰ provision for mandatory or discretionary appointment of counsel to represent the surrogate;⁴¹ and a closed hearing in which the court must make a series of specific findings aimed toward protection of the interests of the various parties to the

35. Robinson & Kurtz, *supra* note 9, at 493. These authors note that "[i]n drafting Alternative A, the Committee made clear, positive choices in each instance to produce a child-oriented act." *Id.* at 494.

36. UNIF. CONCEPTION ACT, *supra* note 9, § 1(3).

37. *Id.* § 1(4).

38. *Id.* § 6(b)(2).

39. *Id.* § 5(a).

40. *Id.* § 6(a).

41. *Id.* § 6(a).

agreement, and most particularly, aimed toward protection of the best interests of the child.⁴² In addition to functional infertility on the intended mother's part,⁴³ the court must find that (1) the surrogate has had at least one pregnancy and delivery;⁴⁴ (2) the surrogate can bear another child without unreasonable risk to herself or the child;⁴⁵ (3) a home study has been conducted of the intended parents and of the surrogate, and both the intended parents and the surrogate, as well as her husband, if any, meet the state's standards of fitness applicable to adoptive parents;⁴⁶ (4) all parties have received counseling concerning the effect of surrogacy, and the court has a record of conclusions about their capacity to enter into and fulfill the agreement;⁴⁷ and (5) the parties have voluntarily entered into the agreement and understand its meaning and effect.⁴⁸ In addition, any reports of medical, psychological, or genetic screening required by other state laws or agreed to by the parties must be made available to all parties.⁴⁹ There also must be adequate provision for all reasonable health-care costs associated with the pregnancy and birth.⁵⁰ Finally, the court must conclude that the agreement will not be "substantially detrimental to the interest of any of the affected individuals."⁵¹ The court's initial order approving the surrogacy agreement governs any conception occurring within twelve months from its original date.⁵²

Prior to a conception, the agreement may be terminated by the court, for cause, or by any of the parties, upon giving written notice to the others.⁵³ In addition, a surrogate who has provided the egg for an assisted conception (the usual case) may recant her decision and terminate the agreement, without liability to the intended parents, by filing written notice to the court within 180 days after the last insemination under the agreement.⁵⁴ Thus, the surrogate is permitted to change her

42. *Id.* § 6, comment.

43. *Id.* § 6(b)(2).

44. *Id.* § 6(b)(6).

45. *Id.* § 6(b)(6).

46. *Id.* § 6(b)(4).

47. *Id.* § 6(b)(7).

48. *Id.* § 6(b)(5).

49. *Id.* § 6(b)(8).

50. *Id.* § 6(b)(9). This requirement extends to responsibility for such costs if the agreement is terminated for any reason, pursuant to the provisions of § 7.

51. *Id.* § 6(b)(10). Additionally, absent agreement to the contrary, the intended parents bear all court costs, attorney's fees, and expenses associated with the hearing. *Id.* § 6(b)(10)(c). The Act also specifically authorizes payment to a surrogate. *Id.* § 9(a). The court maintains continuing exclusive jurisdiction over the matter until a resulting child is 180 days old. *Id.* § 6(b)(10)(e).

52. *Id.* § 6(b).

53. *Id.* § 7(a).

54. *Id.* § 7(b).

mind for roughly the same period of time that she would be entitled to decide to abort, a choice which constitutionally could not be taken from her by agreement.⁵⁵ The surrogate's autonomy rights also are protected by the Act's provision that the agreement may not limit her ability to make decisions concerning her own health care or that of the developing fetus.⁵⁶

Assuming that the surrogate neither aborts nor recants, the agreement becomes specifically enforceable, and the child born is the child of the intended parents.⁵⁷ If the surrogate exercises her recantation right, she is the mother of the resulting child, and her husband, if he was a party to the agreement, is the child's legal father.⁵⁸ If the surrogate was unmarried at the time she entered the agreement, or if a married surrogate's husband was not a party to it, the child's paternity is governed by state law⁵⁹—a situation that might result in the kind of custody dispute present in *In re Baby M*.⁶⁰

As a final precaution, Alternative A provides a procedure for any of the parties to bring an action within 180 days after the child's birth to rebut the Act's presumption that a child born to a surrogate within 300 days after assisted conception has resulted from that assisted conception.⁶¹ Should the action be successful, the child's parentage will be governed by otherwise relevant state law.⁶²

55. The courts have not settled whether a woman's contractual waiver of her abortion right would be recognized by the courts (either as specifically enforceable or as grounds for recovery of damages). Most commentators, however, agree that the abortion decision is reserved to the woman alone and could not be waived, based on the holdings of *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, particularly *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976) (invalidating a requirement for spousal consent to the woman's abortion, partly on the grounds that the state cannot "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising" (quoting the lower court opinion, 392 F. Supp. 1362, 1375 (1975))). See, e.g., M. FIELD, *supra* note 7, at 64-66; Annas, *supra* note 7, at 227-28; Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936 (1986); Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 TENN. L. REV. 71 (1982) (basing her argument on the doctrine that "a court will not order specific performance of a personal service contract, especially when court supervision would be required," *id.* at 85-86).

56. UNIF. CONCEPTION ACT, *supra* note 9, § 9(b).

57. *Id.* § 8(a)(1). Upon receiving written notice of the birth from the intended parents, the court causes a new birth certificate to be issued reflecting their status and has the original placed under seal. *Id.* § 8(b).

58. *Id.* § 8(a)(2).

59. *Id.* § 8(a)(2).

60. *Id.* § 8, comment; *In re Baby M*, 109 N.J. Super. 313, 525 A.2d 1227 (1988). With respect to a similar dilemma under the second alternative, Alternative B, see *supra* note 33.

61. *Id.* § 9(d).

62. *Id.* § 9, comment.

II. The Uniform Act and the Marriage Requirement: A Constitutional Problem?

Surrogacy has been a subject of both increasing use⁶³ and increasing controversy,⁶⁴ creating legal uncertainties that more and more states perceive as intolerable.⁶⁵

Given its origins in the Conference of Commissioners on Uniform State Laws and its adoption by the House of Delegates of the American Bar Association, Alternative A of the Uniform Status of Children of Assisted Conception Act appears to formulate a legalized surrogacy policy that state legislatures are quite likely to consider.⁶⁶ Furthermore, any

63. The OTA estimates that by the beginning of 1988 nearly 600 babies had been born through surrogate arrangements. OTA, INFERTILITY, *supra* note 10, at 267. Time recently estimated that there have been over 2,000 births under surrogacy agreements over the past three years. *And Baby Makes Four*, TIME, Aug. 27, 1990, at 53.

64. Surrogacy has been the subject of numerous articles and debates in both scholarly and popular press publications, particularly since the publicity attendant on *In re Baby M*. See, e.g., M. FIELD, *supra* note 7; E. KANE, BIRTH MOTHER: THE STORY OF AMERICA'S FIRST LEGAL SURROGATE MOTHER (1988); T. SHANNON, SURROGATE MOTHERHOOD: THE ETHICS OF USING HUMAN BEINGS (1988); *Surrogate Motherhood: Politics and Privacy*, *supra* note 13. For recent general commentaries on new reproductive technologies and arrangements, including surrogacy, see REPRODUCTIVE LAWS FOR THE 1990S (S. Cohen & N. Taub 1989); C. SHALEV, BIRTH POWER (1989); L. ANDREWS, NEW CONCEPTIONS (1984); *Symposium on Reproductive Rights*, 13 NOVA L. REV. 319 (1989); *Special Project: Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597 (1986).

65. In recent years, state legislatures have introduced numerous bills to prohibit or regulate surrogacy agreements. In 1988, 59 bills or resolutions pertaining to surrogacy were introduced in 27 states. Twenty-seven of these would prohibit or sharply curtail surrogacy; eighteen would permit it; and fourteen would create a study committee. Eleven states passed bills during that year (four prohibiting all surrogacy; one prohibiting commercial surrogacy; and six establishing study committees). NATIONAL COMM. FOR ADOPTION, 1989 ADOPTION FACTBOOK 120; see also *'Baby M' Decision Creates Flurry of Legislative Activity*, 13 FAM. L. REP. 1295 (1987); *Surrogate Parenthood: A Legislative Update*, 13 FAM. L. REP. 1442 (1987) (containing a chart summarizing 62 bills in 26 jurisdictions, all introduced between January and June 1987; a federal bill had also been proposed); Pierce, *Survey of State Activity Regarding Surrogate Motherhood*, 11 FAM. L. REP. 3001 (1985). See generally Charo, *Legislative Approaches to Surrogate Motherhood*, 16 LAW, MED. & HEALTH CARE 96 (1988).

66. As of this writing, 12 states have passed legislation addressing surrogacy: Arizona, ARIZ. REV. STAT. ANN. § 25-218 (1989) (prohibits all surrogacy parentage contracts); Arkansas, ARK. STAT. ANN. § 9-10-201 (1989) (contemplates surrogacy and provides for a court-ordered substituted birth certificate); Florida, FLA. STAT. ANN. § 63.212 (1)(i) (West Supp. 1990) (voids commercial surrogacy contracts but permits "preplanned adoption" agreements, provided that the volunteer mother may rescind within seven days following birth; the intended parents may pay reasonable medical and legal expenses; the adoption must be finally approved by a court under the Florida Adoption Act); Indiana, IND. CODE ANN. §§ 31-8-1, 31-8-2 (Burns Supp. 1990) (surrogate agreements are void as against public policy); Kentucky, KY. REV. STAT. ANN. § 199.590 (Michie Supp. 1990) (voids commercial surrogacy contracts); Louisiana, LA. REV. STAT. ANN. § 9:2713 (West Supp. 1990) (commercial surrogacy contracts are null and void as contrary to public policy); Michigan, MICH. COMP. LAWS ANN. § 722.851-.861 (West Supp. 1988) (surrogacy contracts are null and void as against public

state legislature contemplating legalized surrogacy, whether or not it chooses to follow the format proposed by the Uniform Act, may well wish to restrict access to surrogacy arrangements to married couples as intended parents of the resulting child. Yet some single persons have already sought to use surrogacy as a means of attaining parenthood,⁶⁷ and others are sure to follow, particularly if the practice of surrogacy is removed from its legal limbo and given official state recognition and sanction. Single persons wishing to assert constitutional challenges against a legislative restriction limiting parenthood through surrogacy to married couples have two available arguments: (1) that such a restriction violates their fundamental right of privacy protected by the Due Process Clause of the Fourteenth Amendment⁶⁸ because it infringes on their right to decide whether to bear or beget a child; and (2) that this legislative classification based on marital status is invidious discrimination which violates their rights under the Equal Protection Clause of the Fourteenth Amendment.⁶⁹

policy; participation is a misdemeanor and brokerage is a felony); Nebraska, NEB. REV. STAT. § 25-21,200 (Supp. 1988) (commercial surrogacy contracts are void and unenforceable; the biological father has all the rights and obligations to the child imposed by law); Nevada, NEV. REV. STAT. ANN. § 127.287(5) (Michie Supp. 1990) (prohibition against payment for private adoption does not apply "if a woman enters into a lawful contract to act as a surrogate"); North Dakota, N.D. CENT. CODE §§ 14-18-01 to 14-18-07 (1989) (substantially adopts the Uniform Act, including Alternative B, declaring all surrogacy agreements void); Utah, UTAH CODE ANN. § 76-7-204 (1989) (all surrogacy contracts are void and unenforceable as contrary to public policy; brokerage is a misdemeanor; the act is prospectively repealed as of July 1, 1991, and prior to January 1, 1991, the Legislative Interim Social Services Committee is to analyze relevant issues and make recommendations to the legislature); 1991 Va. Acts Ch. 600 (Mar. 25, 1991; effective date, July 1, 1993) (to be codified in amendments to VA. CODE ANN. §§ 32.1-261, 32.1-289.1, and 63.1-236.1 and will add to VA. CODE ANN. §§ 20.156-20.165) (permits court-supervised surrogacy and contemplates specific enforceability after 180 days from the last insemination with the intended father's sperm, but permits no compensation to the surrogate beyond reasonable medical and ancillary costs; also has a procedure for validating surrogacy arrangements that have not received prior court approval, when the surrogate agrees to relinquish her parental rights after birth).

67. In its 1987 survey of surrogate mother matching services, the Office of Technology Assessment found nine reports of single men accepted by agencies as prospective clients and one instance of a lesbian couple (presumably, one of these women would have to be the adopting parent). OTA, INFERTILITY, *supra* note 10, at 269. Noel Keane, one of the first brokers of surrogacy contracts in the country, reports examples of both single men and single women seeking surrogacy services. N. KEANE & D. BREO, THE SURROGATE MOTHER 289-90 (1981).

68. U.S. CONST. amend. XIV, § 1, provides, *inter alia*, that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law"

69. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

A. The Due Process Argument: Procreative Liberty

Justice Brennan's famous words from *Eisenstadt v. Baird*⁷⁰ define the constitutionally protected "right of privacy" to include the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁷¹ Some courts⁷² and many commentators⁷³ translate this language into a broad complex of procreative liberties, which cannot be infringed upon, or even regulated to any burdensome extent, without violating the liberty interests protected by the Due Process Clause of the Fifth or the Fourteenth Amendment. According to this view, the "fundamental right to decide whether to bear or beget a child" can be governmentally regulated only by a narrowly tailored means employed in the service of a compelling state interest.⁷⁴

Taken to its logical extreme, the notion that procreative liberty encompasses all possible aspects of the decision "whether to bear or beget a child" means that the government cannot bar access to new reproductive technologies and arrangements unless it can demonstrate some compelling interest in doing so. For example, the practice of surrogacy could constitutionally be prohibited by the government only if such a bar were necessary to prevent exploitation of the women who would serve as surrogates,⁷⁵ or if these arrangements were viewed as violations of "baby

70. 405 U.S. 438 (1972).

71. *Id.* at 453 (1971).

72. For example, the trial court in *In re Baby M* specifically held that the right to noncoital procreation is protected by the Constitution and that this protection extends to the use of a surrogate. 217 N.J. Super. 313, 386, 525 A.2d 1128, 1164 (1987). Of course, the New Jersey Supreme Court reversed this holding. *In re Baby M*, 109 N.J. 396, 448, 537 A.2d 1227, 1253 (1988). The court in *Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 213 (Ky. 1986), cited the protection of constitutional liberty interests as the only role for courts in determining the validity of surrogacy contracts. The court went on to hold that a surrogacy arrangement did not violate Kentucky's statutory prohibition against payment for adoption. *But see Doe v. Kelley*, 106 Mich. App. 169, 307 N.W.2d 438 (1981) (acknowledging a fundamental right to decide whether to bear or beget a child, but holding that the couple's right was not infringed by the state's prohibition of a commercial surrogacy arrangement). The court in *Doe v. Kelley* held such arrangements violated Michigan's statutes against payment for adoption.

73. *See supra* note 7.

74. Courts traditionally employ this criterion in cases concerning fundamental rights generally and rights deemed to be included in the liberty interest protected by the Due Process Clause in particular. *See generally* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 769-1435, esp. 769-80 (2d ed. 1988).

75. The exploitation of women, particularly poor women, is, in the eyes of many, a chief argument militating against the legalization of surrogacy. *See, e.g., Annas, Fairy Tales Surrogate Mothers Tell*, 16 *LAW, MED. & HEALTH CARE* 27 (1988) ("[T]he core reality of surrogate motherhood is that it is both classist and sexist: a method to obtain children genetically related to white males by exploiting poor women." *Id.* at 27). While some feminists agree,

selling" laws.⁷⁶ Women who serve as surrogates, however, arguably can be protected from exploitation by a more narrowly tailored means than outright prohibition.⁷⁷ Also, in the views of many, the "baby selling" argument is overcome by characterizing the agreement as a contract for services, not for a product.⁷⁸ Indeed, prohibition of surrogacy arrangements could be defined as an infringement on both the would-be surrogate's procreative liberty⁷⁹ and the rights of the person or couple who wish to employ her services.

Analysts who hold such an expansive view of procreative liberty may also insist that government cannot properly regulate the conditions under which persons desiring parenthood choose to employ new technologies or arrangements.⁸⁰ Thus, a legislature's limitation of the use of surrogacy to situations in which intended parents are functionally infertile⁸¹ would be just as constitutionally impermissible as a restriction limiting a woman's abortion choice to situations in which pregnancy and delivery would pose an unreasonable risk to her life or health. If this kind of broad procreative liberty is included as an aspect of the constitutionally protected right of privacy, a would-be parent or would-be par-

others see this viewpoint as a paternalistic denial of women's rights to make their own choices. See Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 LAW, MED. & HEALTH CARE 72 (1988); Mahoney, *An Essay on Surrogacy and Feminist Thought*, 16 LAW, MED. & HEALTH CARE 81 (1988).

76. The New Jersey Supreme Court characterized surrogacy as "the sale of a child, or, at the very least, the sale of a mother's right to her child." *In re Baby M*, 109 N.J. 396, 437, 537 A.2d 1227, 1248 (1988). The court found that the payment of money in this context was illegal and perhaps criminal under New Jersey's statute prohibiting the use of money in connection with adoptions. *Id.* at 1240-42. All states have similar laws. Gostin, *supra* note 7. The "baby selling" argument, based on such laws, has been used to invalidate fees and expenses over and above reasonable medical and legal costs. See, e.g., *In re Baby Girl D*, 512 Pa. 449, 517 A.2d 925 (1986) (violation of state constitution). The "commodification" of babies is a primary fear of many opponents of commercial surrogacy. Capron & Radin, *supra* note 7; Holder, *supra* note 7; Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1 (1986).

77. Requirements that the surrogate be separately represented, that she must have had one pregnancy and delivery, and that she receive psychological counseling are examples of protections contemplated by the Act. See UNIF. CONCEPTION ACT, *supra* note 9, at § 6.

78. Gostin, *supra* note 7, at 10-12; Robertson, *Embryos*, *supra* note 7, at 1021-23. The Supreme Court of Kentucky has held that payments to a woman under a surrogacy contract were for her services, and not for the baby. *Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 213-14 (Ky. 1986).

79. Robertson, *Procreative Liberty*, *supra* note 7, at 409. Elsewhere, however, Professor Robertson suggests that the "partial reproductive roles" played by donors and surrogates "may have less of the meaning that gives reproduction its significance, and therefore need not be as fully protected." Robertson, *Embryos*, *supra* note 7, at 956.

80. See, e.g., Robertson, *Procreative Liberty*, *supra* note 7.

81. The Uniform Status of Children of Assisted Conception Act contemplates precisely this type of legislative limitation. UNIF. CONCEPTION ACT, *supra* note 9, § 6(b)(2).

ents could choose to use artificially assisted conception, including surrogacy, simply because pregnancy appears uncomfortable or inconvenient, or because it might be unattractive or interrupt a promising career.⁸²

1. *From Negative to Positive: A Necessary Connection?*

The argument for an expansive definition of procreative liberty based upon the Due Process Clause is flawed in several significant respects. First, it ignores, or minimizes, the significant fact that Supreme Court cases decided under the rubric of "matters so fundamentally affecting a person as the decision whether to bear or beget a child"⁸³ concern protection of the right *not* to procreate, rather than of any rights to conceive, bear, or nurture children. *Eisenstadt v. Baird*, like *Griswold v. Connecticut*,⁸⁴ concerned the right of access to contraceptive devices. *Roe v. Wade*, which held that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"⁸⁵ and the *Roe* progeny all concern aspects and implications of the abortion decision right.⁸⁶ Indeed, Professor John A. Robertson, probably the foremost proponent of a broad definition of procreative liberty,⁸⁷ acknowledges the "negative" nature of the constitutional protections that the Court has defined,⁸⁸ and concedes that "[f]reedom to have sex without reproduction does not guarantee freedom to have reproduc-

82. Robertson, *Procreative Liberty*, *supra* note 7.

The right of married persons to use noncoital and collaborative means of conception to overcome infertility must extend to any purpose, including selecting the gender or genetic characteristics of the child or transferring the burden of gestation to another. Restricting the right of noncoital or collaborative reproduction to one purpose, such as relief of infertility, contradicts the meaning of a right of autonomy in procreation and also raises insuperable problems of definition and monitoring.

Id. at 430.

83. Note that as first used by Justice Brennan, this phrase was uttered in dictum. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). The case actually held that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike." *Id.* The Court specifically declined to base its ruling on due process analysis "because the law fails to satisfy even the more lenient equal protection standard." *Id.* at 447 n.7.

84. 381 U.S. 479 (1965).

85. 410 U.S. 113, 153 (1973).

86. *E.g.*, *Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040 (1989); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

87. See *supra* note 7 and articles cited therein.

88. Robertson, *Embryos*, *supra* note 7, at 955; Robertson, *Procreative Liberty*, *supra* note 7, at 405 n.3.

tion without sex.”⁸⁹

This does not mean that recognition of positive aspects to procreative liberty is altogether lacking in Supreme Court jurisprudence. As long ago as 1942, in *Skinner v. Oklahoma*, the Court spoke of procreation as “one of the basic civil rights of man.”⁹⁰ Like Justice Brennan’s language in *Eisenstadt*, however, this was dictum.⁹¹ The *Skinner* court also based its decision upon equal protection grounds, rather than a due process analysis.⁹² Furthermore, the right referred to in *Skinner* was the *capacity* to procreate, not any particular procreative activity. The Court went on to state that “marriage and procreation are fundamental to the very existence and survival of the [human] race.”⁹³

Nonetheless, it certainly is true that Supreme Court cases have “long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”⁹⁴ In Justice Powell’s words, “A host of cases, tracing their lineage to *Meyer v. Nebraska* . . . and *Pierce v. Society of Sisters* . . . have consistently acknowledged a ‘private realm of family life which the state cannot enter.’”⁹⁵ This realm includes personal decisions “relating to marriage; procreation; contraception; family relationships; and child rearing and education.”⁹⁶ In one abortion rights case, Justice Brennan noted that “[t]he decision whether or not to bear or beget a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy, a right first explicitly recognized in . . . *Griswold v. Connecticut*”⁹⁷

Again, in *Cleveland Board of Education v. LaFleur*,⁹⁸ the Supreme Court held that the requirements of two school boards for extensive maternity leave constituted impermissibly heavy burdens on protected freedoms of choice in matters affecting marriage and family life, thus

89. Robertson, *Procreative Liberty*, *supra* note 7, at 406.

90. 316 U.S. 535, 541 (1942).

91. *See supra* note 83.

92. In *Skinner v. Oklahoma*, the Supreme Court held that the state could not impose automatically forced sterilization for certain criminal activity when other felonies, otherwise carrying the same punishment, were excepted from the operative statute. 316 U.S. at 541-42.

93. *Id.* at 541; *cf.* *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (defining “liberty” to include, *inter alia*, the right “to marry, establish a home and bring up children”).

94. *Cleveland Bd. of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974).

95. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *see also* *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923).

96. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685 (1977) (citations omitted).

97. *Id.*

98. 414 U.S. 632 (1974).

violating the Due Process Clause of the Fourteenth Amendment. *La-Fleur* is in line with the Court's general acknowledgment that "individuals draw much of their emotional enrichment from" relationships such as "those that attend the creation and sustenance of a family—marriage; childbirth; the raising and education of children; and cohabitation with one's relatives"; thus, "[p]rotecting these relationships from unwarranted state interference . . . safeguards the ability independently to define one's identity that is central to any concept of liberty."⁹⁹

Despite the Court's declarations concerning the nature and importance of rights protected by the liberty interest of the Due Process Clause, however, the Court has never recognized a right of coital reproduction outside the marriage relationship.¹⁰⁰ The right of any woman, married or single, to bring an existing pregnancy to term,¹⁰¹ as well as the rights of unwed parents to rear their children,¹⁰² do not negate this conclusion. Furthermore, it is not at all clear that the Court would extend its definitions of privacy rights to include any particular form of noncoital reproduction, for either married or single people.

The definition of procreative liberty that can be gleaned from the Supreme Court's cases to date thus includes a right not to procreate, enjoyed equally by married and single persons, and a right, implicitly recognized by the cases as inhering in the marital relationship, to decide whether or not to have children. The next question is whether this right necessarily includes access to noncoital reproduction.

99. *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984).

100. Some states still retain laws against fornication or nonmarital cohabitation. *See infra* notes 216-18 and accompanying text. In cases dealing with access to contraception by unmarried persons or minors, the Court has not questioned the state's right to criminalize the sexual conduct underlying their use; rather, the Court has found that there was no rational relationship between the prohibition against distribution of the devices and the state's asserted objective of discouraging illicit sexual relations. *Eisenstadt v. Baird*, 405 U.S. 438, 448-50 (1972); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694-96 (1977). A fundamental right to coital reproduction within marriage is apparent from the Court's general pronouncements concerning autonomous decisionmaking about family matters. *See supra* notes 90-99 and accompanying text.

101. Forced abortion obviously would constitute a violent violation of bodily integrity, totally apart from any question of procreative rights. *Cf. Winston v. Lee*, 470 U.S. 753 (1985) (requiring a more substantial state interest than shown to justify forced surgery, under general anesthesia, to remove a bullet from defendant's chest for evidentiary purposes); *Rochin v. California*, 342 U.S. 165 (1952) (forced emetic to discover drugs violated the Due Process Clause).

102. Justice Scalia has noted that "[t]he family unit accorded traditional respect in our society, which we have referred to as the 'unitary family,' is typified, of course, by the marital family, but also includes the household of unmarried parents and their children." Michael H. v. Gerald D., 109 S. Ct. 2333, 2342 n.3 (1989) (plurality opinion).

2. Does Technology Make a Difference?

A strong argument can be made that those who have a "positive" right to procreate¹⁰³ must have access to all available means to exercise that right, including whatever noncoital reproductive techniques might exist. After all, the same values are at stake, whether the conception of the desired child has been accomplished through artificial insemination, in a petri dish, or even in the body of a woman other than the rearing mother who has agreed to be inseminated with the father's sperm and thereafter relinquish her parental rights. Furthermore, the liberty interests protected by the Constitution do not change definition because of the presence or absence of scientific technology as the means for their realization.¹⁰⁴ "Assisted conception" is nonetheless conception, and arguably no more "artificial" than the contraceptive devices to which a right of access has been assured by *Griswold* and *Eisenstadt*.

The *In re Baby M* trial court adopted this line of reasoning and specifically held that the constitutionally protected right of procreation extended to the use of surrogacy, noting that

it must be reasoned that if one has a right to procreate coitally, then one has the right to reproduce non-coitally. If it is the reproduction that is protected, then the means of reproduction are also protected. The value and interests underlying the creation of family are the same by whatever means obtained.¹⁰⁵

The New Jersey Supreme Court disagreed with this characterization of the constitutional protection, stating that "[t]he right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination. It is no more than that."¹⁰⁶ The court also reasoned that Mr. Stern's right of procreation ended when Mrs. Whitehead was artificially inseminated with his sperm, and was not determinative of the subsequent custody dispute.¹⁰⁷ Agreeing, one commentator has stated that "the right to procreate is limited to the right to

103. Those asserting this procreative right may include unmarried persons as well as married couples.

104. This principle is basic to Justice O'Connor's dissent in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452-59 (1983), in which she decries the unworkability of the *Roe v. Wade* trimester framework because scientific advances require constant readjustment of the time periods at which state interests in maternal health and fetal viability demand recognition: "[N]either sound constitutional theory nor our need to decide cases based on the application of neutral principles can accommodate an analytical framework that varies . . . according to the level of medical technology available when a particular challenge to state regulation occurs." *Id.* at 452 (O'Connor, J., dissenting).

105. *In re Baby M*, 217 N.J. Super. 313, 386, 525 A.2d 1128, 1164 (1987).

106. *In re Baby M*, 109 N.J. 396, 448, 537 A.2d 1227, 1253 (1988).

107. The two natural parents equally shared any rights to the custody and nurturing of the child, protected either by New Jersey law or the Constitution. In the New Jersey Supreme

make private choices, and does not include the right to make contracts about reproduction and to ask the legal system to recognize or enforce them."¹⁰⁸ Another has put the matter more bluntly: "Privacy is *not* a technocrat's toy, and does not require the government to keep its hands off any method of procreation that inventors can devise."¹⁰⁹

Whether an appropriate definition of procreative liberty, as protected by the Due Process Clause, should or should not be tied to contemporary scientific technology is not actually the salient issue for evaluating the constitutionality of legislation concerning surrogacy. Although surrogacy makes use of the technology of artificial insemination, the oldest, least exotic of the "reproductive technologies," it is first and foremost a social arrangement—a contract that contemplates the birth of a child and the child's ensuing custody and care. The ordering of social arrangements is the central task of the legal system.¹¹⁰ One of its chief functions always has been the formulation of rules governing the formation and enforcement of cognizable contract rights.¹¹¹ Of course, laws affecting contract rights, like any other laws, will not stand if they contravene constitutional requirements.¹¹² An agreement about the custody, care, and nurturing of a child when the two natural parents of the child are not cohabiting, however, is one kind of contract that our society traditionally has recognized to be an appropriate concern of the legal system, even when the parents are in accord on the matter.¹¹³ This agreement affects the rights not only of a mother and a father but also of a third party—the child. Because children are incapable of speaking up for their own rights, society has endowed the state with that power.¹¹⁴ Moreover, because children are most at risk emotionally and psychologically, their rights must be considered paramount in any legislative or

Court's view, this fact minimized the relevance of any pre-existing custody agreement. 109 N.J. 396, 435-36, 448, 537 A.2d 1227, 1247, 1253-54 (1988).

108. Holder, *supra* note 7, at 53.

109. Annas, *supra* note 75, at 30 (emphasis in original).

110. See, e.g., the definition of "law" in BLACK'S LAW DICTIONARY 884 (6th ed. 1990): "That which is laid down, ordained, or established. A rule or method according to which phenomena or actions co-exist or follow each other. Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force."

111. BLACK'S LAW DICTIONARY defines a "contract" as "[a]n agreement between two or more persons which creates an obligation to do or not to do a particular thing." *Id.* at 322.

112. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

113. See generally H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, ch. 19, 786-849 (2d ed. 1988), esp. 786-87 (tracing the doctrine of *parens patriae*) and 807 (noting the freedom of courts to disregard parental agreements respecting custody, when they find that the child's interests are not being served).

114. *Id.*

judicial decision-making process.¹¹⁵ In other words, the best interests of the child are precisely the kind of compelling state interest that can limit or even vitiate a parent's liberty interests.¹¹⁶ The best interests of the resulting child formed the guiding principle of the Drafting Committee of the Uniform Status of Children of Assisted Conception Act in formulating the model legislation considered in this Article.¹¹⁷

3. *How May a State Define Procreative Liberty to Serve the Best Interests of the Child?*

The arguments thus far advanced support a state legislature's right to choose Alternative B of the Act.¹¹⁸ Based on the legislature's realization of the pitfalls inherent in any surrogacy arrangement and on its evaluation of the best interests of the resulting children, it could choose to prohibit this kind of contractual arrangement altogether. In the event that a legislature chooses to legalize surrogacy arrangements, as contemplated by Alternative A, the above considerations could justify such requirements of the Act as its screening and counseling provisions and the limitation of approved surrogacy contracts to instances of functional infertility.¹¹⁹

115. *Id.*; see esp. *id.* at 786-88. See generally J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); *PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS* (L. Weithorn 1987).

116. Even the trial court in *In re Baby M*, after proclaiming that the Sterns had a constitutionally protected right to procreate by use of a surrogacy arrangement, acknowledged that actual custody rights to the child must be determined by her best interests rather than by the constitutional rights of any of the adults involved. The court based this conclusion on its *parens patriae* jurisdiction, noting that "[a]n agreement between parents is inevitably subservient to the considerations of best interests of the child." 217 N.J. Super. 313, 391, 525 A.2d 1128, 1167 (1987). In overruling the trial court's holding that the surrogacy contract was valid, the New Jersey Supreme Court observed that "the trial court devoted the major portion of its opinion to the question of the baby's best interests. The inconsistency is apparent." *In re Baby M*, 109 N.J. 396, 417, 537 A.2d 1227, 1238 (1988).

117. See Robinson and Kurtz, *supra* note 9, as cited *supra* notes 26 and 35 and accompanying text. The chairman and the reporter of the Committee note particularly that "[t]he narrow scope and focus of the Act . . . develops a valid order that provides for the best interests of the child." *Id.* at 494.

118. UNIF. CONCEPTION ACT, *supra* note 9, § 5, Alternative B.

119. See UNIF. CONCEPTION ACT, *supra* note 9, § 6. Assuming, *arguendo*, that access to surrogacy as a procreative means would be constitutionally protected (at least for married couples) if the practice itself were legalized, these restrictions are no more than narrowly tailored regulations designed to serve the state's compelling interest in the child's well-being and in the physical and psychological health of the adult parties to the agreement. The comment to § 6 emphasizes that all the judicial findings required therein were formulated primarily to serve the best interests of children born of surrogacy and notes that these include protections for the surrogate and intended parents as well. See also Robinson & Kurtz, *supra* note 9, at 494:

The due process argument, however, is that the "fundamental right to bear or beget a child" necessarily includes access to any legal means of procreation.¹²⁰ If state legislatures give surrogacy agreements legal recognition for those unable to procreate in any other way, the question posed by *Eisenstadt v. Baird* is whether a state may limit its definition of this right to married couples while denying it to unmarried persons. The issue, in other words, becomes: Is there a fundamental right to procreate outside the context of marriage? To answer this question, this Article examines the source and nature of the Supreme Court's definitions of "privacy" rights.

Constitutional protection does not extend to every action that one can characterize as concerning an intimate personal relationship or a matter of procreation and childrearing. Justice White recently characterized the appropriate process for defining the liberty interest protected by the Due Process Clause in the following manner:

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut* . . . it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. City of East Cleveland* . . . where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." . . . See also *Griswold v. Connecticut*.¹²¹

Justice Scalia, speaking for the plurality in *Michael H. v. Gerald D.*, similarly quoted Justice Powell's opinion in *Moore v. City of East Cleveland*: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted

In drafting Alternative A, the Committee considered carefully the respective rights and duties of all parties in interest, the planning and review of all terms and components in the arrangements, the guidance of the court, and the concern for those issues necessary to provide the greatest protection for the child.

120. See *supra* notes 72-76 and accompanying text.

121. *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937) and quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J.); *Griswold v. Connecticut*, 381 U.S. 479, 506 (1965) (brackets in original). In *Bowers v. Hardwick*, Justice White went on to find that the Court's formulations of fundamental liberties did not extend to a right to engage in homosexual sodomy, a practice that constituted a criminal offense at common law and that the laws of the thirteen original states forbade at the time the Bill of Rights was ratified. 478 U.S. 186, 192 (1986).

in this Nation's history and tradition.'"¹²² The Court held in *Michael H.* that a California statute presuming the legitimacy of a child born during marriage and barring a biological father from proving his paternity of a child resulting from his adulterous relationship with the child's mother did not violate the biological father's rights, even though the result in that case was to cut off the relationship between himself and his issue. Justice Scalia concluded that "our traditions have protected the marital family . . . against the sort of claim Michael asserts."¹²³ In other words, the state's interest in preserving the values inherent in the traditional marital family unit, composed of the marital couple and the child borne by the mother, was sufficient to override any claims of the biological father, despite his blood relationship with the child and the emotional attachments that had developed between them.¹²⁴ The Court looked to history to find that the adulterous relationship giving rise to the claimant's assertions was not one traditionally accorded protection by society, but, rather, was one traditionally regarded with opprobrium.¹²⁵

Recent pronouncements on the nature of autonomy rights thus make clear that arguable factors of intimacy, personal identity, and self-fulfillment alone will not trigger automatic constitutional protection. These arguments have failed when courts have seen the relationship they were called upon to serve as threatening to traditional family life¹²⁶ or to historical notions of morality.¹²⁷ References to values and relationships that society traditionally has been willing to protect provide shape and substance to the "privacy rights" that often have seemed quite nebulous in earlier decisions.¹²⁸ It is especially relevant to the questions under

122. 109 S. Ct. 2333, 2342 (1989) (quoting 431 U.S. 494, 503 (1977)).

123. *Id.*

124. *See* 109 S.Ct. 2333, 2341-46 (1989).

125. *Id.* at 2342-44.

126. *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989).

127. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

128. Legal commentators have argued that one should construe the "right of privacy" to afford constitutional protection to any "intimate association" that two individuals might find fulfilling. *See* Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980). In his dissent to *Bowers v. Hardwick*, Justice Blackmun characterized the issue much more broadly than did Justice White's majority opinion, stating, "[T]his case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'" 478 U.S. 186, 199 (quoting Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928)). While one easily can disagree with the Court's conclusion in this case, when the only persons affected were the two consenting adults involved in the relationship, the concerns for preservation of an ongoing marital unit and the best interests of a child make the result in *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989), more defensible. At least in the *Michael H.* case, the Court, upholding California's policy against "dual fatherhood," 109 S. Ct. at 2339, avoided the potential confusion and psychological stress arguably inherent in the *Baby M.* result.

consideration here that the specific result in *Michael H.*—that the child's natural father lost all visitation rights, along with any claim to be called her "parent"—hinged to a large extent on the lower court's evaluation of the best interests of the child concerned.¹²⁹ The best interests of the resulting child are, of course, the guiding consideration in the Drafting Committee's decision to restrict access to legalized surrogacy to "a man and woman, married to each other."¹³⁰

Viewed from this perspective, an obvious distinction exists between the constitutional protection afforded to unmarried persons to exercise the right not to procreate¹³¹ and any claim by such persons of a constitutionally protected right of access to any legal means to procreate. The right to contraception or abortion serves autonomy values and also reflects society's traditional interests in preventing the birth of illegitimate children and preserving the marital family unit as a viable entity. The use of assisted conception may serve autonomy values, but it also involves the rights of another group—the children—who have a right to governmental protection of their best interests, even in the face of the quest for personal identity and self-fulfillment sought by adult would-be parents.

If, as the cases indicate, our "history and traditions" are the bases for defining the liberty interest of the Due Process Clause,¹³² then one can make a strong argument that unmarried persons have no constitutionally protected positive right to procreate, either by coital or noncoital means. Any legislation denying them access to otherwise legal reproductive arrangements therefore need meet only a rational basis test.¹³³ Surely a legislature may reasonably conclude that the most desirable environment into which to introduce a child who is to be born pursuant to a surrogacy arrangement¹³⁴ is one that will include two parents, a man

129. 109 S. Ct. 2333, 2337-38 (1989).

130. UNIF. CONCEPTION ACT, *supra* note 9, § 1(3).

131. This right is protected by *Eisenstadt v. Baird*, *Roe v. Wade*, and their progeny.

132. See *supra* notes 126-27 and accompanying text.

133. This test for constitutionality, deriving from Chief Justice John Marshall's famous opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), requires that courts uphold legislation so long as it is reasonably related to a legitimate governmental interest. For purposes of measuring validity under the Due Process Clause, courts will hold legislation to the higher standard of "heightened scrutiny" only if it intrudes upon a liberty interest protected by that Clause. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* §§ 11.5-11.7 (3d ed. 1986).

134. Whether or not children born as a result of surrogacy arrangements—or through use of any of the other emerging "reproductive technologies"—might be psychologically adversely affected by the circumstances of their births is a matter for debate. Time has yet to develop telling empirical data on this point, although, as Martha Field suggests, "[i]t does not seem that children born of surrogacy need experience greater feelings of rejection than those com-

and a woman, who are married to each other. This family structure, after all, exemplifies our "history and tradition,"¹³⁵ which has been the subject of special protection under the Due Process Clause.¹³⁶ A legislature might therefore reasonably assume this family structure will most likely serve the best interests of the child to be born.

Even if the courts applied heightened scrutiny to the Act's marriage requirement under a due process analysis,¹³⁷ the legislation's objective would survive the test. Serving the best interests of the children is not only an important state interest, it is a compelling one.¹³⁸ The question then becomes whether the married-parent requirement is related to that objective in a manner sufficiently substantial to justify its inclusion in Alternative A of the proposed Act.

As the counterargument claims,¹³⁹ it is true that beginning life in the context of a two-parent "traditional" family is no guarantee that a child will grow up in that same configuration. An increasingly large number of children today are brought up by single parents,¹⁴⁰ whether by reason of divorce or separation,¹⁴¹ death of a parent,¹⁴² or birth outside wedlock¹⁴³—a status that has lost much of its former opprobrium.¹⁴⁴ A

mon to adopted children generally." M. FIELD, *supra* note 7, at 54 (but, noting that "reactions vary, of course," she does cite some instances of AID children angry and grieved by their inability to trace their biological origins). *Id.* The New Jersey Supreme Court was concerned about "the impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money." *In re Baby M*, 109 N.J. 396, 441, 537 A.2d 1227, 1250 (1988); see *infra* note 221 and accompanying text.

135. For a strong defense of this position, see Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983). For statements of the counter philosophy, see Note, *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980).

136. See *supra* notes 92-99 and accompanying text.

137. The courts' analysis would be based on the theory that procreative liberty necessarily encompasses access to all legal means of reproduction, including assisted conception.

138. H. CLARK, *supra* note 113, at 786-88 (tracing the doctrine of *parens patriae* and relating it to the "best interests of the child" standard in custody decision-making).

139. See, e.g., Kritchevsky, *supra* note 8, at 32; M. FIELD, *supra* note 7, at 59-60.

140. In 1988, 72.7% of all children under age 18 were living with both parents, down from 85.2% in 1970. In 1988, 21.4% of all children were living with their mothers only, compared to 10.8% in 1970; 2.9% were living with their fathers only, compared to 1.1% in 1970. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, Table No. 69 (1990).

141. In 1988, 7.9% of all children under age 18 were living with divorced mothers, up from 3.3% in 1970. Furthermore, 5.3% of all children lived with mothers who were married but whose husbands were absent, up from 4.7% in 1970. *Id.*

142. In 1988, 1.3% of all children under age 18 were living with widowed mothers, down from 2% in 1970. Comparable statistics were not available for those living with fathers only. *Id.*

143. In 1988, 6.8% of all children under age 18 were living with never-married mothers, up from .8% in 1970. *Id.*

strong case can be made that it is more psychologically damaging to a child to grow up in a quarrelsome, tension-filled two-parent household than to grow up with the stigma of illegitimacy or any other "lack" accompanying an otherwise loving association with a single parent.¹⁴⁵ Moreover, the fact that children begin life with a single parent does not necessarily mean that is how they will grow up, any more than the converse. Single parents frequently find mates with whom they form new or "blended" family units.¹⁴⁶ In light of these facts, a legislative requirement that only married couples may qualify as intended parents in a surrogacy arrangement may indeed seem untenable, particularly if heightened scrutiny is applied.

Nonetheless, our current knowledge of child psychology still suggests that the best environment for a child's optimal development is the stable, heterosexual, two-parent family.¹⁴⁷ Under the Act, the child will

144. See NATIONAL COMM. FOR ADOPTION, *supra* note 65, at 12.

145. See, e.g., J. BELSKY, R. LERNER, & G. SPANIER, *THE CHILD IN THE FAMILY* 32 (1984) ("[F]amily experts suggest that it is far better for a child to grow up in a loving home with one parent than in a battleground with two."); MacKinnon, *An Observational Investigation of Sibling Interaction in Married and Divorced Families*, 25:1 *DEVELOPMENTAL PSYCHOLOGY* 36 (1989) (finding that interparental conflict was more determinative of negative behavior in children than was actual marital status).

146. See Hetherington, Cox, & Cox, *Effects of Divorce on Parents and Children*, in *NON-TRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT* 233, 281 (M. Lamb 1982) (citing one study that found that after six years approximately 70% of divorced women and 80% of divorced men had remarried); Santrock, Warshak, & Elliott, *Social Development and Parent-Child Interaction in Father-Custody and Stepfamily Families*, in *NON-TRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT* 289; Felner & Terre, *Child Custody Dispositions and Children's Adaptation Following Divorce*, in *PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS* 106 (L. Weithorn 1987). But see Bumpass & Sweet, *Children's Experience in Single-Parent Families: Implications of Cohabitation and Marital Transitions*, 21 *FAMILY PLANNING PERSPECTIVES* 256, 259 (Nov./Dec. 1989) (finding that only 36% of children whose parents separate or who are born to an unmarried mother become part of a two-parent family within five years and that overall, 53% will remain in a single-parent home throughout childhood). See generally J. WALLERSTEIN & S. BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* (1989).

147. Child care specialists and developmental psychologists vary in their willingness to emphasize this point directly, although it is clearly an operating premise of much of their work. Many point out that we simply lack sufficient research findings to make accurate generalizations about the psychological effects of growing up in a single-parent family—particularly the household of a never-married parent—partly because this is still a relatively new phenomenon. Even studies of children of divorced parents may not be very helpful in this regard. This is true partly because the divorce itself is a separate psychologically disruptive event, and partly because divorce does not necessarily result in subsequent absence of the noncustodial parent from the child's life. Dr. John Munder Ross, a clinical psychologist in New York specializing in the father-child relationship, in commenting on father absence, has stated, "Recent studies have pointed to four major deficiencies. . . . Fatherless kids have trouble with their sexual identity, difficulty in feeling individual and separate from their mother, problems in cognitive and intellectual functioning as revealed in school performance, and difficulty control-

at least begin life this way. The Act's requirement for a home study and a finding that the intended parents meet the state's standards of fitness applicable to adoptive parents should go far to insure that the child will be brought into a psychologically healthy environment, including a stable marriage.¹⁴⁸ A relationship with a parent of each sex provides a wider range of interactions on a daily and intimate basis for the child.¹⁴⁹ In the

ling aggressive impulses." Morrisroe, *Mommy Only*, NEW YORK MAGAZINE, June 6, 1983, at 23, 28. See also Sokoloff, *Alternative Methods of Reproduction: Effects on the Child*, 26 CLINICAL PEDIATRICS 11, 14 (Jan. 1987) (commenting on the use of AID by single women and raising doubts about whether "raising a child in the absence of a father even approaches the best interests of the child"); accord, B. SPOCK AND M. ROTHENBERG, DR. SPOCK'S BABY AND CHILD CARE 46 (1985) ("I feel, from pediatric and psychiatric experience, that, if possible, it is preferable for children to live with two parents (one may be a stepparent) if the parents love and respect each other. Then the children will know both sexes realistically as well as idealistically, and will have a pattern of marital stability to guide them when they are adults."); see also J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *supra* note 115, at 16 (noting, as a reason for developmental problems among children, "The prolonged absence or death of one parent may place the child at risk. He is deprived of the benefits of a relationship with two adults who have an intimate relationship with each other."). The authors cite the fact that a 1972-73 survey of the Child Psychiatry Unit of the Yale University Child Study Center's caseload disclosed that 29% of the patients were from single-parent homes. *Id.* at 114 n.2; cf. B. WHITE, *THE FIRST THREE YEARS OF LIFE* 300-01 (1985) (commenting, with respect to the father's role in childrearing, that we lack sufficient research to know whether fathers make unique contributions, and concluding that the ideal would consist of "(1) equal time for both parents in raising babies, (2) along with part-time work . . . for both parents, and (3) occasional use of high-quality substitute child care"). Brazelton has noted the difficulties that single parents have with their babies' and young children's moves toward independence, which can make it more difficult for children to develop their separate sense of identity. See T. BRAZELTON, *ON BECOMING A FAMILY: THE GROWTH OF ATTACHMENT* 185-199 (1981); T. BRAZELTON, *TODDLERS AND PARENTS: A DECLARATION OF INDEPENDENCE* 71-98 (1974); cf. Weiss, *Growing Up a Little Faster: The Experience of Growing Up in a Single-Parent Household*, 35:4 J. SOC. ISSUES 97 (1979) (noting that children who grow up in single-parent households may mature faster than their peers, but they may also be resentful of their increased responsibility or feel less secure after the withdrawal of the noncustodial parent). Most researchers concentrate on the factor of father (not mother) absence, although some also discuss situations in which the father is the single parent. See, e.g., T. BRAZELTON, *TODDLERS AND PARENTS*, *supra*, at 88-98. See generally Rosenberg, *Single Parent Adoption: An Issue of Difficulty and Import for Adoption Agencies* (National Comm. for Adoption 1987) (paper presented at the Annual Conference of the North American Council on Adoptable Children, Aug. 8, 1987) (noting the general lack of longitudinal studies, making resolution of the issue difficult, but pointing to recent research about the differing interactions between infants and their mothers and infants and their fathers, which suggests to Rosenberg that adoption agencies should not consider single persons to be on an equal footing with married couples in making placement decisions).

148. Although every state permits single parents to adopt, see *infra* notes 172-73 and accompanying text, the National Committee for Adoption has found that "[m]ost adoption agencies place babies only with married couples. . . . And most birthmothers express a desire for their child to be adopted by a married couple." NATIONAL COMM. FOR ADOPTION, *supra* note 65, at 162.

149. H. LYTTON, *PARENT-CHILD INTERACTION: THE SOCIALIZATION PROCESS OBSERVED IN TWIN AND SINGLETON FAMILIES* 274-77 (1980); Lamb, *Father-Infant and*

stable, heterosexual, two-parent family, there is both a same-sex adult with whom the child can identify, and a member of the opposite sex from whom the child can learn much that may otherwise be virtually unavailable.¹⁵⁰ Psychologists also observe that children receive value from living in an adult-interactive environment, where they see two parents, each with differing approaches and views, solving problems and making mutual decisions.¹⁵¹ These observed behavior patterns provide a model for the children's own relationships, which may include marriage.¹⁵²

Even if the parents eventually separate, the child of two parents has both emotional ties and legal rights that the single-parent child might never attain. Many of the values arising from a relationship with a parent of each sex can survive a marital breakup.¹⁵³ In addition, legal rights such as support, inheritance, and guardianship are important both to a child's psychological well-being and to her overall physical situation in the world. If one parent dies or becomes incapacitated, the child with

Mother-Infant Interaction in the First Year of Life, 48 CHILD DEVELOPMENT 167, 179 (1977) ("[I]nasmuch as their experiences with the two parents differ, it is plausible to argue that infants develop different expectations and learn different behavior patterns from each parent and thus that the two relationships have different consequences for sociopersonality development."); see also J. BELSKY, R. LERNER, & G. SPANIER, *supra* note 145, at 51-56 (pointing out differing maternal and paternal influences in such areas as infant socioemotional development); *id.* at 61-62 (early childhood intellectual competence); *id.* at 71-74 (sex-role development).

150. F. DODSON, *HOW TO FATHER* 7, 10-11 (1974) ("Some aspects of fatherhood are interchangeable with similar aspects of motherhood. But certain phases are unique to the father and only he can play this part of the parental role. If he fails to fulfill this role, his wife cannot take over and do the job no matter how good a mother she is."); J. BELSKY, R. LERNER, & G. SPANIER, *supra* note 145, at 71-74. Note also their finding that when there is a marital breakup "several investigations indicate that sons and daughters alike function better when reared in the home of the same-sex parent." *Id.* at 148; see also *id.* at 156 (noting adverse effects on sex-role development in father-absent families for boys below the age of five and for adolescent girls); cf. B. SPOCK & M. ROTHENBERG, *supra* note 147, at 47 (emphasizing the difference between gender identity and gender role, and declaring that it is the former function that is important).

151. J. BELSKY, R. LERNER, & G. SPANIER, *supra* note 145, at 123-26. The dual-parent household also is likely to create a healthier environment because the adults' mutual support of each other (particularly the father's support of the mother) enables them to be better parents. *Id.* at 126-30; cf. B. White, *supra* note 147, at 301 ("A case can be made for the role of the father, if not with respect to the welfare of children, then to that of parents."); see also Gongla, *Single Parent Families: A Look at Families of Mothers and Children*, in ALTERNATIVES TO TRADITIONAL FAMILY LIVING 5, 10-11 (H. Gross and M. Sussman 1982); MacKinnon, *supra* note 145, at 36 ("Divorced mothers are less consistent and affectionate, communicate less well, and are more restrictive than mothers in married families.").

152. See, e.g., MacKinnon, *supra* note 145, at 42 (negative behavior between siblings may simply mirror their parental models, whether the parents are married or divorced).

153. See, e.g., Gongla, *supra* note 151, at 18-19 (noting the growing awareness that "the parental status remains after the marital status dissolves" and that positive father-child relationships after divorce are associated with "high self-esteem and the absence of depression in children of both sexes and at all ages").

two parents has obvious psychological and legal advantages.¹⁵⁴ Given all of these circumstances, a state legislature is justified in requiring that the intended parents in a state-approved surrogacy arrangement be "a man and woman, married to each other."

B. The Equal Protection Argument: Who Is "Similarly Situated"?

A determination that access to legalized surrogacy either is not a form of procreative liberty protected by the Constitution, or, even if it is, that it may be regulated in the service of the best interests of the resulting child, does not necessarily answer the equal protection concerns raised by Justice Brennan in *Eisenstadt v. Baird*. That case held that there was no rational basis for distinguishing between married couples and single persons on the issue of right of access to contraceptives.¹⁵⁵ The principles of *Eisenstadt* present a serious challenge to the classification based on marital status that determines who may have access to parenthood through surrogacy under Alternative A of the Uniform Status of Children of Assisted Conception Act.

The Equal Protection Clause of the Fourteenth Amendment requires that state legislatures provide similar treatment for those who are similarly situated: "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"¹⁵⁶ The initial inquiry thus seeks to identify the "object of the legislation," which can then be used to analyze persons as "similarly" or "dissimilarly" "circumstanced," in order to determine whether the classification chosen is "reasonable, not arbitrary." If the objective reflects a legitimate concern of the government, courts will defer to the legislature's judgment¹⁵⁷ on who is "similarly circumstanced," unless the classification chosen represents a suspect or quasi-suspect category in the eyes of the Supreme Court, or unless a fundamental right is involved.¹⁵⁸ In the case of the Uniform Status of Children of Assisted Conception Act, the object of the legislation, as

154. See *Morrisroe*, *supra* note 147, at 29, which quotes one never-married mother:

I look at my son and shudder when I realize I'm all he's got As a single parent, I also feel obligated to take good care of my health so that nothing will happen to me. . . . It's a constant worry because no one will love him the way a mother loves him.

155. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

156. *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

157. See the discussion of the "rational basis test," *supra* note 133 and accompanying text.

158. In *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), Justice White cogently summarized equal protection doctrine:

repeatedly stated by the Drafting Committee, is to serve the best interests of the children resulting from assisted conception¹⁵⁹—clearly a legitimate state concern.¹⁶⁰ According to the Drafting Committee's chairperson and its reporter, that legislative mandate, received from the general Conference of Commissioners on Uniform State Laws, instilled a feeling of "great urgency on the part of the Drafting Committee to provide a child with two legal parents."¹⁶¹ This in turn served the purpose of providing children of assisted conception with the same basic rights as the vast majority of children of natural conception.¹⁶² The rights under consideration include both tangible interests, such as property and inheritance rights, and less tangible ones, such as a sense of psychological security and self-identity.

The classification chosen to achieve these ends was based upon marital status, which is not a suspect or quasi-suspect classification.¹⁶³ The remaining question, in light of *Eisenstadt*, is whether there is a rational basis for distinguishing between married couples and unmarried persons in the right of access to parenthood through surrogacy.¹⁶⁴ The same

The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. . . . When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude . . . and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process.

The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. . . . Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution. . . .

Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. . . . A gender classification fails unless it is substantially related to a sufficiently important governmental interest. . . . Because illegitimacy is beyond the individual's control and bears "no relation to the individual's ability to participate in and contribute to society," official discriminations resting on that characteristic are also subject to somewhat heightened review.

Id. at 440-41 (citations omitted). The Court in *Cleburne* went on to hold that "the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation." *Id.* at 442.

159. See generally Robinson & Kurtz, *supra* note 9.

160. See *supra* note 138 and accompanying text.

161. Robinson & Kurtz, *supra* note 9, at 493.

162. Despite the increasing incidence of both divorce and illegitimacy, as of 1988, 72.1% of children under the age of 18 lived with both parents. BUREAU OF THE CENSUS, *supra* note 140, Table No. 69.

163. See *supra* note 1 and accompanying text.

164. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

considerations raised in the context of the due process argument—that as far as we know, the best environment for a child's optimal development is the stable, heterosexual, two-parent family—appear to supply an affirmative answer to this question as well.¹⁶⁵

The issue is more complex than might appear at first blush, however, because the limitation is inconsistent with policies governing other state-regulated means of achieving parentage: both adoption and AID are accessible to unmarried persons.¹⁶⁶ Presumably, the same state concern, serving the best interests of the affected children, is also at work in these areas of state regulation.¹⁶⁷ In the latter instance (AID), the inconsistency in state policy raises the specter of possible gender-based discrimination, which requires a higher standard than "reasonableness" to be justifiable. Furthermore, even if the state can show a sufficient basis for requiring that the "intended parents" of a child born pursuant to a surrogacy contract be "a man and woman," does that thereby justify the additional requirement that they also be "married to each other"? In other words, is there a rational basis for distinguishing between married and unmarried couples in this situation? Because the basic requirement of the Equal Protection Clause is one of similar treatment for those who are similarly situated, resolution of the inquiry requires a determination of who is similarly situated.

165. See *supra* note 134 and accompanying text.

166. The other major noncoital means of reproduction is *in vitro* fertilization (IVF) in which egg and sperm are united in a petri dish and the embryo is then transferred for implantation in a woman's body. Even more recent is gamete intrafallopian transfer (GIFT), in which ova and sperm are transferred by catheter to a woman's fallopian tubes, where fertilization may take place. The Office of Technology Assessment estimates that these techniques may help 10% to 15% of infertile couples who cannot otherwise be treated. OTA, INFERTILITY, *supra* note 10, at 7. The Uniform Status of Children of Assisted Conception Act would cover children born as a result of these technologies, when the egg and sperm did not come from the two social parents. UNIF. CONCEPTION ACT, *supra* note 9, § 1(1). These techniques, however, need not receive separate consideration here, because if either the egg or the sperm in an IVF or a GIFT case comes from a donor, the child's status will necessarily follow the pattern of either AID or surrogacy. Either the gestational mother will also be the social mother, in which case AID provides the appropriate framework of analysis, or the gestational mother will be a surrogate, in which case a state's choice of Alternative A or Alternative B will govern the situation.

167. This is clearly the case in adoption, in which the standard for decision-making is the best interests of the child. See *infra* notes 159-64 and accompanying text. Concern with the best interest of the resulting child is less apparent in AID regulation, although general stipulations that artificial insemination be performed by a licensed physician, that the husband consent, and that the child is legally the child of a consenting husband all protect the health and legal status of both the mother and the child. See, e.g., UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1988).

1. *Those Who Seek Parenthood Through Adoption and Those Who Seek Parenthood Through Legalized Surrogacy*

Adoption is the oldest and the most traditional state-sanctioned means for either married or unmarried persons to achieve parenthood outside coital reproduction.¹⁶⁸ The advent of legalized abortion, together with the recent trend of single mothers who keep their babies, have resulted in a dearth of the most "adoptable" children—white infants¹⁶⁹—and have played a large part in the demand for access to new reproductive technologies and arrangements.¹⁷⁰ Public policy regarding the criteria regulating who may adopt is thus a logical starting point for determining who should have access to other state-regulated means of achieving parenthood, including legalized surrogacy. It could be argued that there is no rational basis for distinguishing between the standards that should govern the two situations. This is particularly true because the Act's surrogacy provisions largely follow an adoption model, specifically requiring home studies and findings that both the intended parents and the surrogate and her husband, if any, meet the standards of fitness applicable to adoptive parents in the jurisdiction.¹⁷¹

All states permit both married and single persons to adopt,¹⁷² typically in a statute listing eligible adoptive parents, with no stated preferences.¹⁷³ An adoption decree will always be based upon the best interests

168. Adoption did not exist at common law and is entirely a creation of state statute. It has been described as "the state's response to the needs of children whose parents are unable or unwilling to care for them . . . [and] the procedure by which the state attempts to find a permanent home for those children who are without one." Atwell, *Surrogacy and Adoption: A Case of Incompatibility*, 20 COLUM. HUM. RTS. L. REV. 1, 11 (1988). Every state has statutes regulating the adoption procedure. For a brief history of adoption practice and a state-by-state summary of state regulations, see NATIONAL COMM. FOR ADOPTION, *supra* note 65, at 18-34.

169. Information published by the Child Welfare League of America reveals that

[i]n more recent years a much smaller proportion of adolescents who carry their pregnancies to term are choosing adoption. Currently over 90% elect to parent their children rather than plan adoption for them. . . . Although currently no nationwide statistical information exists, adoption practitioners report that there continues to be a decline in the number of white infants and preschool children in need of adoption.

CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICE 5 (rev. ed. 1988).

170. See Wadlington, *supra* note 10, at 466-67 (citing as reasons for the decreasing availability of children for adoption "legal availability of abortion and contraception; diminished social and legal stigma accompanying illegitimacy; recognition of constitutional limits on legal discrimination predicated on illegitimate status; greater economic opportunity and child care services for single women; and changing male attitudes about child raising roles").

171. UNIF. CONCEPTION ACT, *supra* note 9, § 6(b)(3), (4).

172. H. CLARK, *supra* note 113, at 908; G. DOUTHWAITE, UNMARRIED COUPLES AND THE LAW 45-46 (1979).

173. *E.g.*, The Uniform Adoption Act provides, "The following individuals may adopt: (1) a husband and wife together although one or both are minors; (2) an unmarried adult; (3) the

of the minor child,¹⁷⁴ however, and there is evidence that marital status will be a relevant, though not necessarily determinative, factor in the judge's decision.¹⁷⁵ A New York Family Court judge might well have expressed a common bias in the following statement:

Adoption by a single person has generally and in this Court's experience been sought and approved only in exceptional circumstances, and in particular for the hard-to-place child for whom no desirable parental couple is available. In the universal view of both experts and laymen, while one parent may be better than none for the hard-to-place child, joint responsibility by a father and mother contributes to the child's physical, financial and psychic security as well as his emotional growth. This view is more than a matter of present convention, anthropologists pointing out that the institution of marriage, which is a method of signifying commitment to such joint responsibility, evolved in response to the need for two-parent care of children.¹⁷⁶

Although agency adoption standards have eased since these words were written in 1972,¹⁷⁷ and the common practice of judges is to follow agency recommendations,¹⁷⁸ the Child Welfare League of America's re-

unmarried father or mother of the individual to be adopted; (4) a married individual without the other spouse joining as a petitioner, if the individual to be adopted is not his spouse, and if . . . the petitioner and the other spouse are legally separated" UNIF. ADOPTION ACT § 3, 9 U.L.A. 20 (1971).

174. See generally H. CLARK, *supra* note 113, at 905-21. The Uniform Adoption Act specifies that the Court is to enter a final decree of adoption only after it has determined "that the adoption is in the best interest of the individual to be adopted." UNIF. ADOPTION ACT § 13, 9 U.L.A. 41 (1971).

175. Annotation, *Marital Status of Prospective Adopting Parents as Factor in Adoption Proceedings*, 2 A.L.R.4TH 555 (1980), contains a number of citations to court decisions in which marital status was obviously a key factor in the adoption decision. See Comment, *Single Factor Based on Petitioner's Marital Status Cannot Determine the Best Interests of the Child: In re W.E.R.*, 663 S.W.2d 887 (Tex. 1983), 16 TEX. TECH. L. REV. 573 (1985).

176. Adoption of H., 69 Misc. 2d 304, 311-12, 330 N.Y.S.2d 235, 245 (N.Y. Fam. Ct. 1972) (footnotes omitted).

177. The 1969 Guidelines for Adoption Service published by the Child Welfare League of America stated that "the agency should select families in which a husband and wife are living together. Yet a single-parent applicant might be considered when no other home is available for a specific child, and when the applicant is part of a family to which the child will have the security of belonging." Quoted in H. CLARK, *DOMESTIC RELATIONS, CASES AND PROBLEMS* 553 (3d ed. 1980). The new guidelines, published in 1988, contain the following section on Marital Status:

When applicants are married, the husband and wife should be living together and the relationship should be of sufficient duration to give evidence of its stability.

Single parents (unmarried, widowed, or divorced) should be considered in accordance with their ability to meet the needs of available children and not solely on the basis of their marital status.

CHILD WELFARE LEAGUE OF AMERICA, *supra* note 169, at 50.

178. Homer Clark attributes the fact that "[a]doption statutes contain surprisingly few restrictions on the persons eligible to receive children for adoption" to "the intention to rely

vised Standards for Adoption Service reflect a similar mindset.¹⁷⁹ These revised Standards make constant references to "adoptive parents" throughout its guidelines, and acknowledge that "single applicants" are among those groups from which adoptive parents can frequently be found "for ethnic and racial minority, older, disabled, and emotionally disturbed children."¹⁸⁰

It thus appears that there is substantial evidence for believing that both adoption agencies and judges favor the married, two-parent family for the overwhelming majority of the children whom they place through adoption proceedings. Even if that were not the case, an analogy between state-sanctioned adoption and state-sanctioned surrogacy is weak. Unlike the surrogacy situation, in which a child is to be deliberately conceived, adoption policy deals with the difficult social problem of providing a desirable home for a child already in existence whose parents are either unwilling or unable to provide a home. It is clearly preferable to place children with even one loving parent willing to provide a home than to keep children institutionalized or continually subjected to the vagaries of foster care. Therefore, the unmarried would-be parent who applies to adopt an existing child and the unmarried would-be parent who wishes to use surrogacy to bring about a new conception are not "similarly situated" with respect to the governmental objective of serving the best interests of children. A legislature may reasonably treat them differently without violating the Equal Protection Clause.

2. *Those Who Seek Parenthood Through AID and Those Who Seek Parenthood Through Legalized Surrogacy*

Artificial insemination of a woman with the sperm of an anonymous donor (AID)¹⁸¹ is a second means of achieving parenthood noncoitally

upon adoption agencies, either as part of the placement process itself or in investigating and making recommendations to the courts, to screen out the unsuitable adoptive parents" He goes on to note the considerable power that agencies have as a result, because "[t]he agency's refusal to place a child with prospective adoptive parents, although it may theoretically be reviewable by the courts, as a practical matter will seldom be challenged." H. CLARK, *supra* note 113, at 908.

179. CHILD WELFARE LEAGUE OF AMERICA, *supra* note 169, at 6.

180. *Id.* Still speaking of these hard-to-place children, the Standards state, "The urgent need for more adoptive families has led to . . . [s]electing single parents and those who already have birth or adopted children." *Id.* See also the finding of the National Committee for Adoption that "[m]ost adoption agencies place babies only with married couples." NATIONAL COMM. FOR ADOPTION, *supra* note 65, at 162.

181. Artificial insemination by sperm from a woman's husband (AIH) is also, of course, a possibility, and is somewhat more common than AID. See *supra* note 11. Because that practice raises no legal issues of parentage, it is not separately regulated and will receive no attention here. The Act, by its terms, does not apply to any pregnancy of a wife resulting from

and is the oldest of the "reproductive techniques" designed to enable couples or individuals to have biological children they might otherwise be unable to conceive.¹⁸² Thirty-one states have statutes providing that a child conceived in this manner is the child of a consenting husband and that if the donation was provided through a licensed physician, the semen donor is not legally the child's natural father.¹⁸³ AID is presumably legal and available to all in the nineteen states that have not chosen to enact specific laws governing the practice.

None of the thirty-one statutes currently in force requires that the woman to be inseminated be married,¹⁸⁴ and several specifically contemplate that she may be unmarried.¹⁸⁵ Thus, even though some of the legislation's wording indicates a presumption of marriage,¹⁸⁶ and even though some court cases have granted parental rights to known semen donors when the mother was single,¹⁸⁷ there is no doubt that a state, by enacting legalized surrogacy under Alternative A of the Uniform Status of Children of Assisted Conception Act, would be according different treatment to those seeking parenthood through surrogacy and those seeking it through AID.¹⁸⁸

fertilizing her egg with the sperm of her husband. UNIF. CONCEPTION ACT, *supra* note 9, § 1(1); *see also* UNIF. PARENTAGE ACT, § 5, 9B U.L.A. 301 (1973) (concerning AID).

182. OTA, INFERTILITY, *supra* note 10, at 242.

183. *See id.* at 243, for a chart listing thirty of the states with regulations and summarizing their provisions. Since that report, Missouri has enacted a law regulating AID. MO. ANN. STAT. § 2110.824 (Vernon Supp. 1990) (speaking in terms of "a wife," acting with the consent of her husband and under the supervision of a licensed physician); *see also* UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1973). The Uniform Status of Children of Assisted Conception Act does away with the licensed physician requirement to eliminate possible ambiguities concerning the child's legal status in the event that the physician services were not used. It also presumes paternity in the husband of any married woman who bears a child through assisted conception and places the burden on her husband to show lack of consent. *See* UNIF. CONCEPTION ACT, *supra* note 9, § 3.

184. *See* OTA, INFERTILITY, *supra* note 10, at 242-46 (including summary chart of state statutes at 242).

185. *See, e.g.,* OHIO REV. CODE ANN. §§ 3111.30-38 (Anderson 1986); 1985 Or. Laws §§ 109.239-.243, 109.247.

186. The Office of Technology Assessment concludes that the presumption of a consenting husband in some statutes leaves open the question of the legal effect if the woman is single. OTA, INFERTILITY, *supra* note 10, at 246.

187. *C.M. v. C.C.*, 170 N.J. Super. 586, 407 A.2d 849 (1979); *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986). The OTA finds these cases to be demonstrations of "the strength of the judicial interest in ensuring two legal parents to a child born as a result of artificial insemination." OTA, INFERTILITY, *supra* note 10, at 247. The same result was reached recently in *In re R.C.*, 775 P.2d 27 (Colo. 1989).

188. Adoption of the entire Act would of course result in differing treatment because the Act itself governs the status of a child born through AID. *See* UNIF. CONCEPTION ACT, *supra* note 9, §§ 1-4; *id.* § 10 and accompanying comments.

The equal protection argument is stronger here than in the adoption scenario. First, there is no existing child who needs a home with a loving parent. AID, like surrogacy, is used to bring into existence a child who otherwise would not be born. One might well question whether a rational basis exists for distinguishing between the prerequisite qualifications to use AID versus those needed to use legalized surrogacy. Secondly, the distinction in legislative treatment might be characterized as gender-based discrimination, which must survive a higher level of judicial scrutiny than a rational basis test.¹⁸⁹ This argument arises from the fact that a single woman who wishes to parent her own biological child has the legal means to do so through the use of AID. A single man with the same desire, however, can succeed in fathering his biological child through assisted conception only if he has access to surrogacy.¹⁹⁰ Therefore, once surrogacy is given legal recognition, to prohibit its use by unmarried persons results in differing state treatment of access by unmarried women and unmarried men to assisted conception.

Ultimately, the arguments that it is constitutionally impermissible for state legislatures to establish different qualifications for access to legalized surrogacy and access to AID have no substance. The same arguments used in this Article's due process discussion, suggesting that there is no fundamental "positive" right to procreate possessed by single people¹⁹¹ and certainly no fundamental right for single persons to have access to noncoital reproductive techniques,¹⁹² apply with equal force in this context. The result is that all means of assisted conception, including both AID and surrogacy, may be subjected to reasonable regulations. Legislatures therefore are entitled to regulate different forms of assisted conception in different ways, so long as those regulations are reasonable in relation to the subject matter and seek to serve some permissible legislative purpose.

A legislature's decision not to restrict access to AID to married couples simply represents its realization that artificial insemination is accomplished easily by the parties themselves. The drafters of the Uniform Status of Children of Assisted Conception Act even chose to eliminate

189. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

190. Noel Keane, one of the first brokers of surrogacy contracts in the United States, has reported that "[s]ingle men are increasingly seeking surrogate mothers as a solution to having children without romantic entanglements." N. KEANE & D. BREO, *supra* note 67, at 289-90.

191. See *supra* notes 83-93 and accompanying text.

192. See *supra* notes 100-09 and accompanying text.

the physician-assisted requirement found in many statutes,¹⁹³ on the grounds that it was "not realistic in light of present practices in the field of artificial insemination."¹⁹⁴ In the past, self-administered artificial insemination has led to questions and litigation concerning parental rights with respect to children,¹⁹⁵ a possibility that the drafters strongly sought to avoid.¹⁹⁶ If legal access to AID were restricted to married persons, foreseeable circumventions of the marriage requirement would create the kind of legal morass that now exists in unregulated surrogacy contracts. Therefore, even though a legislature might reasonably find that a married-parent situation is the best environment for a child, it also might reasonably find that imposing the requirement when AID is used would disserve the best interests of children who undoubtedly would be born outside the statute's protections.

On the other hand, under the Act's proposed scheme for legalized surrogacy, a legislature reasonably could impose a married-parent requirement that it believed would serve the best interests of the resulting

193. See, e.g., § 5 of the Uniform Parentage Act, stipulating

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. . . . (b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1973). Twenty-one states require that a physician perform the insemination. OTA, INFERTILITY, *supra* note 10, at 242.

194. UNIF. CONCEPTION ACT, *supra* note 9, § 4, comment.

195. In *C.M. v. C.C.*, 170 N.J. Super. 586, 407 A.2d 849 (1979), the unmarried couple had unsuccessfully sought the aid of a sperm bank to perform the artificial insemination. While there, they learned enough about the technique to perform it themselves. Before the child was born, C.M. broke off her relationship with C.C. and he successfully sued for visitation rights. See also *In re R.C.*, 775 P.2d 27 (Colo. 1989); *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986) (known donors of semen to single women were permitted parental visitation rights; failure to meet the physician-assistance requirement was one factor in reaching each decision); *supra* note 187 and accompanying text. The Office of Technology Assessment has gone so far as to say that, given the potential ambiguities concerning the child's legally cognizable parentage, even when the inseminated woman is married, "[t]he reasonableness of State laws that directly or indirectly require a physician to perform artificial insemination is questionable." OTA, INFERTILITY, *supra* note 10, at 244.

196. See, e.g., the statement by the chairman and reporter of the Drafting Committee that

[t]he Act was designed primarily to effect the security and well-being of children born and living in our midst as a result of assisted conception. The Conference's Executive Committee and the general Conference [of Commissioners on Uniform State Laws], considering the plight of these children, some with five biological parents, some with no readily identifiable biological parents, and some with other deprivations, determined that the greatest priority and first call on the energy and talent of the Drafting Committee was to provide an act which addressed these and other deficiencies.

Robinson & Kurtz, *supra* note 9, at 492.

children. A surrogacy contract would be enforceable only if the required court approval were secured before any artificial insemination pursuant to the contract.¹⁹⁷ Of course, unmarried persons and others seeking to avoid the statute's strictures could continue to enter into surrogacy agreements and take their chances that the surrogate would relinquish custody of the child at birth. If she did not, however, the would-be parent(s) would have no recourse. For example, a single man who entered into such a contract with a surrogate might find either that the surrogate's husband would be the child's legally recognized father¹⁹⁸ or that the surrogate would have custody rights but he would be responsible for child support under otherwise relevant state law.¹⁹⁹ These dismal prospects differ from the situation of the unauthorized use of AID, in which the inseminated woman generally can count on having a child to rear, at the very least.²⁰⁰ Thus, a legislature may conclude that it would be unreasonable, although desirable, to impose a married-parent requirement for the use of AID, but entirely reasonable to impose such a restriction on the use of surrogacy. Adults seeking parenthood through these different techniques simply are not "similarly situated" from the standpoint of a legislative objective to serve the best interests of the children to be conceived. Therefore, the Equal Protection Clause does not require that they be treated identically.

A more serious equal protection challenge to the Act's requirement that intended parents in a surrogacy arrangement be married arises from the contention that this provision results in gender-based discrimination. The effect of the requirement, when combined with either the Act's provisions²⁰¹ or any current state policy concerning AID,²⁰² is that single females have access to assisted conception for producing their own biological children, while single males do not.²⁰³ Although this argument has an immediate appeal in light of Supreme Court decisions subjecting

197. UNIF. CONCEPTION ACT, *supra* note 9, § 5(b) (declaring void any agreement not approved by a court, as authorized by the statute).

198. If the surrogate is married and her husband is a party to the agreement, he will be the child's legal father. *Id.*

199. If the married surrogate's husband was not a party to the agreement, or if the surrogate is single, paternity is determined by other state law. *Id.*

200. Although a woman in this situation might find that the known semen donor had parental visitation rights, *see supra* notes 187 and 195 and accompanying text, she realistically could expect to retain custody unless the state had other reasons for terminating her parental rights.

201. UNIF. CONCEPTION ACT, *supra* note 9, §§ 1-4.

202. *See supra* notes 183-185 and accompanying text.

203. The problem of the single male wishing to use a surrogacy arrangement in order to sire a child to rear is considered in Clark, *New Wine in Old Skins: Using Paternity-Suit Settlements to Facilitate Surrogate Motherhood*, 25 J. FAM. L. 483 (1986-87).

gender-based discrimination to heightened judicial scrutiny,²⁰⁴ it, too, ultimately fails.

The operative legislative classification in the surrogacy provisions of the Uniform Act is marital status, not gender. Marital status never has been held to trigger heightened constitutional consideration.²⁰⁵ The fact that reasonable regulations designed to serve the best interests of children resulting from different means of assisted conception result in different consequences for single women and single men is not the end product of invidious discrimination. "Invidious discrimination" stems from a "purposeful" classification consciously employed by the legislature.²⁰⁶ In the case of gender-based discrimination in particular, the classification must operate in a manner that is not substantially related to an important governmental interest.²⁰⁷

In this instance, a comparison of the differing legislative treatment of AID and of legalized surrogacy by the Act and other current state policies simply does not support a conclusion of a purposeful, gender-based distinction. The Supreme Court's decision in *Personnel Administrator of Massachusetts v. Feeney*²⁰⁸ provides important insight. In that case, the Massachusetts law giving veterans who qualified for state civil service positions a lifetime preference was challenged under the Equal Protection Clause on the grounds that the statute's operation overwhelmingly favored males. The Court held the preference was valid because the statute was neutral on its face, did not represent purposeful discrimination or a pretext for such discrimination,²⁰⁹ and served otherwise valid legislative purposes. Of course, some females did qualify for the prefer-

204. See, e.g., *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

205. The Court decided *Eisenstadt v. Baird*, 405 U.S. 438 (1972), on a rational basis test. See also *supra* note 158 for a summary of current equal protection doctrine as stated by Justice White in *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

206. See generally *L. TRIBE*, *supra* note 74, at 1502-05, citing, *inter alia*, *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976) (discussed *infra* notes 208-10, and accompanying text).

207. See *supra* note 189 and accompanying text.

208. 442 U.S. 256 (1979).

209. One particularly relevant portion of Justice Stewart's opinion states:

The appellee's ultimate argument rests upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary action. . . . The decision to grant a preference to veterans was of course "intentional." So, necessarily, did an adverse impact upon nonveterans follow from that decision. And it cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women

ence in *Feeney*.²¹⁰ It is likewise true in the present instance that some single females will be just as adversely affected by the marriage requirement in the Act's surrogacy provisions as single males.²¹¹ These would include women who are infertile and therefore cannot use AID and women who cannot gestate and would therefore like to implant ova in a surrogate for artificial insemination. The criteria employed by Justice Stewart in *Feeney* are equally valid here. The policy of imposing different marital status criteria for access to AID and access to surrogacy is a gender-neutral policy on its face that does not represent purposeful gender-based discrimination or any pretext for such discrimination and that serves an otherwise valid legislative purpose—the best interests of the resulting children. Therefore, even though a single male does not have access to assisted conception through surrogacy, while a single female does through AID, there is no occasion for heightened judicial scrutiny. The two are not “similarly situated” within the confines of traditional equal protection prohibitions.

3. *Married Versus Unmarried Couples: Does It Reasonably Make a Difference?*

Does the reasonableness of a legislature's belief that the best environment for a child's optimal development is the stable, heterosexual, two-parent family²¹² automatically validate the additional stipulation that the parents be “married to each other”? Or might there be a strong argument that married and unmarried heterosexual couples who meet the state's criteria for adoptive parents should be considered “similarly situated” for purposes of assessing their candidacy for parenthood through a legalized surrogacy arrangement?²¹³

The number of cohabiting couples in the United States has risen

were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.

“Discriminatory purpose,” however, implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.

Id. at 278-79 (citations and footnote omitted). The same statements apply to the policies embodied in the surrogacy provisions of the Act.

210. Only a very few women qualified for Massachusetts' veterans preference. At the time of the litigation, only 1.8% of the veterans in Massachusetts were female. *Id.* at 270.

211. Noel Keane reports that “some single women are seeking surrogate mothers for the same reason as single men. Unlike the males, however, the women will have to take an extra step and find a sperm bank or anonymous donor willing to provide the semen for artificial insemination” N. KEANE & D. BREO, *supra* note 67, at 290.

212. See *supra* notes 147-54 and accompanying text.

213. A recent survey of surrogacy services conducted by the Office of Technology Assessment revealed that at least 90% of the clients were married couples; but there were

dramatically in recent years; their households often include children.²¹⁴ Social acceptance of this type of living arrangement also has evolved,²¹⁵ and remaining legal prohibitions are universally ignored.²¹⁶

Nonetheless, public policy has not reversed itself to the point of outright endorsement. Some courts have held fornication and cohabitation statutes violative of privacy rights protected by the federal Constitution.²¹⁷ Laws prohibiting cohabitation remain on the books in nine states, and eleven states (five of which also have cohabitation statutes) make fornication illegal. Even when no such prohibitions exist, states generally do not accord to cohabitation arrangements the kinds of legal protections afforded marriage, such as rights to property division upon breakup.²¹⁸ A legislature therefore reasonably may distinguish between married couples and unmarried, cohabiting couples when it establishes criteria for access to legalized surrogacy.

Although many cohabitation relationships undoubtedly include a deep commitment by the couple, a legislature reasonably might conclude that couples who have not formalized their living arrangement with the social and legal ties of marriage are more likely to separate than are married couples.²¹⁹ Although the success of any marriage is not guaranteed,

five reports of unmarried couples accepted by agencies to match with surrogate mothers. OTA, INFERTILITY, *supra* note 10, at 269.

214. In 1988 almost 2.6 million unmarried heterosexual couples lived together, up from fewer than 1.6 million couples in 1980 and just over .5 million in 1970. Almost one-third of cohabiting couples in 1988 had one or more children under the age of 15 in the household. Not quite half of the cohabiting adults previously had been married. BUREAU OF THE CENSUS, *supra* note 140, Table No. 54.

215. NOW LEGAL DEFENSE AND EDUCATION FUND & R. CHEROW-O'LEARY, THE STATE-BY-STATE GUIDE TO WOMEN'S LEGAL RIGHTS 15 (1987). *See generally* I. SLOAN, LIVING TOGETHER: UNMARRIEDS AND THE LAW (1980); G. DOUTHWAITE, *supra* note 172.

216. *See, e.g., Doe v. Duling*, 782 F.2d 1202 (4th Cir. 1986). The court vacated a lower court ruling on the constitutionality of Virginia's fornication and cohabitation statutes, finding that no case or controversy existed because there was no real basis for fear of prosecution. The court noted that no one had been convicted under the fornication statute since 1849, and the last recorded conviction for private, consensual cohabitation occurred in 1883. *Id.* at 1204.

217. *See New Jersey v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977); *see also Doe v. Duling*, 603 F. Supp. 960 (E.D. Va. 1985) (holding Virginia's fornication and cohabitation statutes unconstitutional), *vacated*, 782 F.2d 1202 (4th Cir. 1986).

218. I. SLOAN, *supra* note 215; G. DOUTHWAITE, *supra* note 172.

219. One source states that observers have generally traced cohabitation arrangements to three types of situations: (1) trial marriage; (2) financial considerations (either fearing a loss of Social Security or pension benefits if the partners were to marry or living together to reduce expenses); and (3) preference for cohabitation rather than "the long-term, permanent legal commitment of marriage." A. HEMPHILL & C. HEMPHILL, WOMANLAW 78 (1980). The second reason frequently applies to older persons. Either the first or third (as well as the second, when it applies to a younger couple) lends credibility to a legislature's potential doubts about the long-term stability of the relationship. The instability of cohabitational unions is also noted in Thornton, *Cohabitation and Marriage in the 1980s*, 25 DEMOGRAPHY 497 (Nov.

children born pursuant to a surrogacy contract are more likely to enjoy the stability of the two-parent situation sought by the Act if they begin life with a man and woman who have made this kind of commitment to each other. In addition, the legal rights of marriage partners vis-à-vis each other also serve to protect the child, particularly if there should be a separation or divorce.²²⁰

The emotional and psychological health of the child born of surrogacy is a primary concern of the state. The effects of such origins on a child's sense of security and self-identity will necessarily remain speculative for some time.²²¹ It stands to reason, however, that any adverse psychological consequences would only be exacerbated by children's perceptions of a tenuousness in the relationship between their rearing parents, as this is the bedrock for any child's growth and development. A state legislature is entitled to protect children's chances for optimal development by demanding that a man and woman who wish to become parents through surrogacy be married to each other.²²² From the perspective of the legislature's goal to serve the best interests of children

1988); Bennett, Blanc & Bloom, *Commitment and the Modern Union: Assessing the Link Between Premarital Cohabitation and Subsequent Marital Stability*, 53 AM. SOC. REV. 127 (Feb. 1988).

220. For example, divorce would entail an equitable division of property between the parties and perhaps alimony to one spouse. These would supplement the children's support rights (which would obtain in any case) to enhance their economic well-being in the custodial parent's household. A dissolution of a nonmarital union generally would not include rights to a property settlement or alimony payments. See *supra* note 218 and accompanying text.

221. The New Jersey Supreme Court expressed concern about these effects. See *supra* note 134. Sokoloff has raised similar doubts. Sokoloff, *supra* note 147, (concerning children conceived by AID). A policy statement issued by the American College of Obstetricians and Gynecologists expresses concern about "adverse psychological effects" on children of both AID and surrogacy and notes that there are "no data" addressing the issue. AMERICAN COLLEGE OF OBSTETRICS AND GYNECOLOGY, STATEMENT OF POLICY, ETHICAL ISSUES IN SURROGATE MOTHERHOOD (May 1983). Parents using AID often keep the fact secret from their children; 84% of married couples surveyed in one study did not plan to tell their children of their AID origins. Leeton & Backwell, *A Preliminary Psychosocial Follow-Up of Parents and Their Children Conceived by Artificial Insemination by Donor (AID)*, 1 CLINICAL REPRODUCTION AND FERTILITY 307 (1982). Maintaining secrecy appears more problematical if the parent is single or when surrogacy is involved, because family and friends will know whether a woman was pregnant. When children are aware of their AID origins, there is some evidence of adverse reaction. See M. FIELD, *supra* note 7, at 54 (noting both negative and positive reactions to such knowledge); R. SNOWDEN & G. MITCHELL, THE ARTIFICIAL FAMILY 85-90 (1983) (containing three letters written by AID children, each reacting quite negatively to the situation).

222. In those jurisdictions that do make cohabitation or fornication illegal, despite the failure to enforce those laws, it would be a markedly inconsistent public policy to permit a couple engaged in an illicit relationship to receive a court's imprimatur as a household that would serve the best interests of a child born of surrogacy. Even when the couple's living arrangement is not explicitly illegal, it is still likely to be an object of opprobrium in the society in which such a child will grow up, perhaps making her a victim of social stigma.

resulting from legalized surrogacy, married couples and unmarried couples are not "similarly situated" under the Equal Protection Clause.

4. *The Intended Parents and the Surrogate: A Statutory Inconsistency*

One troubling aspect of the marriage requirement of the Uniform Status of Children of Assisted Conception Act is that it applies only to the "intended parents" in a surrogacy arrangement and not to the surrogate herself. Yet, if the surrogate supplies the egg (the usual case),²²³ she has a right to terminate the agreement for 180 days following the last insemination under the contract.²²⁴ If she exercises her right and is unmarried,²²⁵ the child will not live in a home with "a man and woman, married to each other."²²⁶ Because at the time of conception both an egg-donating surrogate and the intended parents have the potential for providing the child's eventual custodial home, they are arguably "similarly situated," and should therefore be subjected to the same marriage requirement.²²⁷

Again, however, it is important to remember that the measuring standard for classification by marital status is reasonableness. A legislature might require the intended parents in a surrogacy contract to be married, but not impose that same requirement on the surrogate, for several reasons. To begin with, the entire agreement is premised on the assumption that the surrogate will not be the rearing parent. The surrogate's recantation right is narrowly circumscribed, and the psychological counseling mandated for all parties²²⁸ should go far towards in-

223. OTA, INFERTILITY, *supra* note 10, at 267.

224. UNIF. CONCEPTION ACT, *supra* note 9, § 7(b).

225. If the surrogate is married and her husband was a party to the agreement, he is the child's legal father. If the surrogate's husband was not a party to the agreement, or if she is unmarried, paternity is determined by otherwise relevant state law. *Id.* § 8(a)(2). Because the child's biological father would be known, either of the last two possibilities might result in a custody dispute such as occurred in *In re Baby M.*

226. The child, however, might still have "two legal parents," as the Drafting Committee sought to provide. See Robinson & Kurtz, *supra* note 9, at 493. Either the surrogate's husband, though not a party to the agreement, would be the child's legal father (perhaps subject to rebuttal of the statutory presumption with physical evidence, see, e.g., the California statute at issue in *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989) and *supra* notes 122-23 and accompanying text), or the child's biological father, as the known semen donor, might have the right to legitimate the child, or at least might be entitled to assert parental rights. Cf. *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986); *In re R.C.*, 775 P.2d 27 (Colo. 1989); *C.M. v. C.C.*, 170 N.J. Super. 586, 407 A.2d 849 (1979); *supra* notes 187 and 195 and accompanying text.

227. The new Virginia statute requires the surrogate in a court-approved arrangement to be married; her husband must also be a party to the agreement. 1991 Va. Acts Ch. 600 (Mar. 25, 1991) at § 20-160.

228. UNIF. CONCEPTION ACT, *supra* note 9, § 6(b)(7).

surging the selection of surrogates who will remain comfortable with their agreements.²²⁹

A requirement that surrogates be married would eliminate approximately forty percent of potentially suitable candidates.²³⁰ Given the heavy presumption that the surrogate will abide by the contract,²³¹ a basic statutory purpose of providing biologically related children to loving parents arguably would be disserved by imposing a marriage requirement on the surrogate. Furthermore, the requirement would be inconsistent with state policy regarding artificial insemination generally, as single women in all states are permitted access to AID.²³² An unmarried woman might argue successfully that the state could not, consistent with due process and equal protection principles, deny her the right to artificial insemination for the purpose of serving as a surrogate while permitting her to receive AID for the purpose of bearing a child that she intended to bring up by herself.²³³ Thus, the intended parents and the surrogate are not "similarly situated" with respect to the legislative purpose of serving the best interest of a child conceived through surrogacy. There are sufficient distinctions between them to survive an equal protection challenge under a rational basis test.

5. *The Intended Parents: Uniquely Situated*

Comparing surrogacy with other noncoital procreative techniques and arrangements demonstrates that the intended parents' position in a surrogacy contract is sufficiently distinguishable from the resulting parents' situation in those other instances that state policies may rationally differentiate between them. Children requiring adoption are served better by one loving parent than by an institution.²³⁴ Fertile single women seeking AID could easily circumvent a prohibition, thereby creating a large group of children whose confusing legal status could only work to their psychological detriment. Unmarried couples do not offer the same

229. An additional protection lies in the requirement that the surrogate must have had at least one pregnancy and delivery. *Id.* § 6(b)(6). The judge also must make specific findings that "all parties have voluntarily entered into the agreement and understand its terms, nature, and meaning, and the effect of the proceeding," *id.* § 6(b)(5), and that "the agreement will not be substantially detrimental for the interest of any of the specific individuals." *Id.* § 6(b)(10).

230. OTA, INFERTILITY, *supra* note 10, at 273-74.

231. The OTA survey discovered that "the majority of surrogacy arrangements proceed without judicial involvement, with few reported instances of parties reneging on their agreements." *Id.* at 268. The additional protections provided by the Act should reduce the incidence of surrogates who wish to change their minds.

232. See *supra* notes 183-85 and accompanying text.

233. This assumes, of course, that the unmarried woman otherwise meets all the criteria required by the Act. See UNIF. CONCEPTION ACT, *supra* note 9, § 6.

234. See J. GOLDSTEIN, A. FREUD & A. SOLNIT *supra* note 115, at 32 (1973).

potential for stability as those already married,²³⁵ a factor the state might consider especially acute in a new area of social experimentation. As the surrogate herself is not expected to be the rearing parent, her marital status is of less consequence.

Even so, a state legislature examining the Act might be well advised to consider imposing the marriage requirement on an egg-donating surrogate²³⁶ as well as on the intended parents. If a married egg-donating surrogate exercises her termination right within 180 days of the last insemination under the contract, her husband will be the child's legal father, so long as he was a party to the contract.²³⁷ While the intended parents would suffer profound disappointment, and certainly should recover all expenses and fees paid under the contract, the legal status of the child would be protected, and her parents would be "a man and woman, married to each other." On the other hand, if an egg-donating surrogate who recants is unmarried, the known biological father is likely to dispute custody, and the stage would be set for another *Baby M* case. Because avoidance of this possibility was a major impetus for the court supervision established by Alternative A of the Act and arguably should be a major concern for any legislation clarifying the legal status of a child born of surrogacy,²³⁸ a legislature seeking to guarantee that children will have two legal parents should include clear requirements that the surrogate be a married woman and that her husband join in the contract.²³⁹ A single woman's argument that she could resort legally to AID to have a child to rear and therefore cannot be denied insemination for surrogacy purposes is ultimately unpersuasive. The entire point of Alternative A of the Act is that surrogacy is a new form of social arrangement for our society. It therefore requires differing treatment from all other social ar-

235. See *supra* note 226 and accompanying text.

236. See UNIF. CONCEPTION ACT, *supra* note 9, § 7(b). A surrogate who has not provided the egg does not have a recantation right under the Act.

237. *Id.* § 8(a)(2).

238. See Robinson & Kurtz, *supra* note 9, at 494 ("Because of the limited focus of the Act, we believe it will eliminate the need for protracted litigation."). See generally *Case Review Essays on the New Jersey Supreme Court Baby "M" Decision*, 16 LAW, MED. & HEALTH CARE 113 (1988) (including Rothenberg, *Baby "M," the Surrogacy Contract, and the Health Care Professional: Unanswered Questions*, 16 LAW, MED. & HEALTH CARE 113; Smith, *The Case of Baby "M": Love's Labor Lost*, 16 LAW, MED. & HEALTH CARE 121; Bezanson, *Solomon Would Weep: A Comment on In the Matter of Baby "M" and the Limits of Judicial Authority*, 16 LAW, MED. & HEALTH CARE 126).

239. This requirement actually could have the effect of minimizing the number of recantations. A strong likelihood exists that a surrogate's husband would not wish to take on the legal responsibilities of fatherhood for another man's biological child and would urge his wife to abide by the contract. A single surrogate, on the other hand, might be more likely to look upon the child as a potential source of love and companionship.

rangements, particularly as the basic concern at stake is the best interest of the child to be conceived. A legislature seeking to provide maximum protection for such children might well require that they have legal status in the home of a married couple from the beginning.²⁴⁰

6. *Heightened Scrutiny and Equal Protection Analysis*

Even if heightened scrutiny should be deemed appropriate under the Equal Protection Clause, the Act's grant of access to surrogacy solely to married couples is neither overinclusive nor underinclusive.²⁴¹ It is not overinclusive because not all marital couples qualify for the statute's favored treatment. Couples also must pass the hurdles of satisfying the home study, undergoing psychological counseling, and convincing a judge that their participation in a surrogacy agreement as intended parents will not be detrimental to their interests.²⁴² All of these standards must be met before a court will grant the requisite approval to validate the contract.²⁴³ A state legislature that wishes to add to these qualifications is free to do so, and such a possibility is specifically contemplated by the Act.²⁴⁴

The classification by marital status also is not underinclusive in a manner that cannot survive heightened scrutiny. Undoubtedly there are single individuals and unmarried couples who would make warm, loving parents and who would meet all other criteria required by Alternative A of the Act. Even so, current knowledge of psychological development tells us that these persons cannot provide the optimum conditions for a child's sense of identity and security,²⁴⁵ particularly when the child has been born pursuant to the terms of a surrogacy agreement.²⁴⁶ A child derives benefits from interacting with two parents of opposite sex and from living in an environment in which those adults themselves interact in positive ways.²⁴⁷ These benefits, combined with the high value that our society places on the institution of marriage, particularly for the rear-

240. Of course, the marital union could be severed at any time after conception, in the household of either the intended parents or the surrogate. This risk, however, is no different from that inherent in natural procreation by a married couple, and is probably lower because of the protections provided by the home study.

241. See L. TRIBE, *supra* note 74, at 1446-50, for a general discussion of "underinclusiveness" and "overinclusiveness" (noting that legislation measured by a rational basis test is rarely invalidated for underinclusiveness).

242. UNIF. CONCEPTION ACT, *supra* note 9, § 6; see also *supra* notes 42-54 and accompanying text.

243. UNIF. CONCEPTION ACT, *supra* note 9, § 6(b).

244. *Id.* § 6(b)(8).

245. See *supra* notes 147-54 and accompanying text.

246. See *supra* note 221 and accompanying text.

247. See *supra* notes 147-52 and accompanying text.

ing of children, create an atmosphere in which the child of a stable, heterosexual marriage is virtually bound to have more opportunities to thrive than is the child who lacks that background.²⁴⁸ Because the best interests of the resulting children are paramount, legislatures may justifiably choose to require that background for children born pursuant to surrogacy agreements bearing the state's specific approval.

III. Conclusion

The marriage requirement for intended parents is only one aspect of the overall regulatory scheme imposed by the Uniform Status of Children of Assisted Conception Act upon those seeking parentage through legalized surrogacy. This Article has examined potential constitutional objections to that particular provision because it appears to be one of the provisions most vulnerable to attack and also one of the most likely bases for attack upon the proposed Act. The concepts examined in this Article, particularly substantive due process considerations, are equally applicable to other objections that might be raised against the Act on constitutional grounds. Such objections include attacks upon the notion of any governmental regulation in this area at all. Even if it is conceded that state legislatures have the power to prohibit surrogacy arrangements altogether, the constitutionally protected right of privacy, if broadly applied to legalized surrogacy, would virtually nullify the legislature's power to regulate this new form of social arrangement. Once constitutional rights are defined to include a given sphere of human activity, principled line-drawing within that sphere becomes an extremely difficult proposition. If state legislatures deem themselves faced with a bald choice between prohibition and legalization of surrogacy, the likelihood of their choosing the more conservative route seems high indeed. Ironically, the "constitutionalization" of this family law area might very well inhibit the experimentation with expanded possibilities for achieving parentage that advocates of procreative liberty seek to bring about.

Points made by commentators²⁴⁹ who favor broad procreative liberties concerning the self-actualization and fulfillment experienced by adults through parenthood are well taken. Mutually enriching relationships of love and growth between parent and child can flourish whether or not the child was conceived in the "usual" way and whether two parents are involved or only one. Changing social attitudes have already removed much of the stigma of birth outside wedlock, and the traditional

248. *Id.*

249. *See, e.g.,* sources cited *supra* note 7.

nuclear family²⁵⁰ is increasingly the exception rather than the norm.

Into this social flux new technologies and arrangements of "assisted conception" are becoming available and may one day make our current structures and norms seem quite outmoded. Nonetheless, as we start down a path that may contain social and psychological pitfalls, it is important to keep in mind that the children whose existence we plan and bring about are the innocent and unwitting repositories of our experimentation. Whether they become victims or beneficiaries of our social and genetic planning depends upon the wisdom of our actions. These future children deserve to have their best interests placed first in our hierarchy of social values. Their interests are paramount even in the face of the strong, natural longings of adult would-be parents, whether married or single, who seek the assistance offered by reproductive technology.

As we set our course of social planning for this promising future, we owe it to the children we are creating to proceed with caution. The day may come when our understanding of human psychology will be sufficient to free us for more expansive definitions of family structuring, even in the planning stage. Until then, the legislative bodies responsible for effectuating our social decision-making are entitled to proceed with circumspection if they so choose. The Constitution that shelters our most cherished values does not require that they behave differently.

250. "Traditional nuclear family" here refers to a married couple and their biological or adopted children.

Appendix

UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT

SECTION 1. DEFINITIONS

In this [Act]:

(1) "Assisted conception" means a pregnancy resulting from (i) fertilizing an egg of a woman with sperm of a man by means other than sexual intercourse or (ii) implanting an embryo, but the term does not include the pregnancy of a wife resulting from fertilizing her egg with sperm of her husband.

(2) "Donor" means an individual [other than a surrogate] who produces egg or sperm used for assisted conception, whether or not a payment is made for the egg or sperm used, but does not include a woman who gives birth to a resulting child.

(3) ["Intended parents" means a man and woman, married to each other, who enter into an agreement under this [Act] providing that they will be the parents of a child born to a surrogate through assisted conception using egg or sperm of one or both of the intended parents.]

(4) "Surrogate" means an adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents.

SECTION 2. MATERNITY

[Except as provided in Sections 5 through 9,] a woman who gives birth to a child is the child's mother.

SECTION 3. ASSISTED CONCEPTION BY MARRIED WOMAN

[Except as provided in Sections 5 through 9,] the husband of a woman who bears a child through assisted conception is the father of the child, notwithstanding a declaration of invalidity or annulment of the marriage obtained after the assisted conception, unless within two years after learning of the child's birth he commences an action in which the mother and child are parties and in which it is determined that he did not consent to the assisted conception.

SECTION 4. PARENTAL STATUS OF DONORS AND DECEASED INDIVIDUALS

[Except as otherwise provided in Sections 5 through 9:]

(a) A donor is not a parent of a child conceived through assisted conception.

(b) An individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child.

ALTERNATIVE A

[SECTION 5. SURROGACY AGREEMENT

(a) A surrogate, her husband, if she is married, and intended parents may enter into a written agreement whereby the surrogate relinquishes all her rights and duties as a parent of a child to be conceived through assisted conception, and the intended parents may become the parents of the child pursuant to Section 8.

(b) If the agreement is not approved by the court under Section 6 before conception, the agreement is void and the surrogate is the mother of a resulting child and the surrogate's husband, if a party to the agreement, is the father of the child. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].

SECTION 6. PETITION AND HEARING FOR APPROVAL OF SURROGACY AGREEMENT

(a) The intended parents and the surrogate may file a petition in the [appropriate court] to approve a surrogacy agreement if one of them is a resident of this State. The surrogate's husband, if she is married, must join in the petition. A copy of the agreement must be attached to the petition. The court shall name a [guardian ad litem] to represent the interests of a child to be conceived by the surrogate through assisted conception and [shall] [may] appoint counsel to represent the surrogate.

(b) The court shall hold a hearing on the petition and shall enter an order approving the surrogacy agreement, authorizing assisted conception for a period of 12 months after the date of the order, declaring the intended parents to be the parents of a child to be conceived through assisted conception pursuant to the agreement and discharging the guardian ad litem and attorney for the surrogate, upon finding that:

(1) the court has jurisdiction and all parties have submitted to its jurisdiction under subsection (e) and have agreed that the law of this State governs all matters arising under this [Act] and the agreement;

(2) the intended mother is unable to bear a child or is unable to do so without unreasonable risk to an unborn child or to the physical or mental health of the intended mother or child, and the finding is supported by medical evidence;

(3) the [relevant child-welfare agency] has made a home study of the intended parents and the surrogate and a copy of the report of the home study has been filed with the court;

(4) the intended parents, the surrogate, and the surrogate's husband, if she is married, meet the standards of fitness applicable to adoptive parents in this State;

(5) all parties have voluntarily entered into the agreement and understand its terms, nature, and meaning, and the effect of the proceeding;

(6) the surrogate has had at least one pregnancy and delivery and bearing another child will not pose an unreasonable risk to the unborn child or to the physical or mental health of the surrogate or the child, and this finding is supported by medical evidence;

(7) all parties have received counseling concerning the effect of the surrogacy by [a qualified health-care professional or social worker] and a report containing conclusions about the capacity of the parties to enter into and fulfill the agreement has been filed with the court;

(8) a report of the results of any medical or psychological examination or genetic screening agreed to by the parties or required by law has been filed with the court and made available to the parties;

(9) adequate provision has been made for all reasonable health-care costs associated with the surrogacy until the child's birth including responsibility for those costs if the agreement is terminated pursuant to Section 7; and

(10) the agreement will not be substantially detrimental to the interest of any of the affected individuals.

(c) Unless otherwise provided in the surrogacy agreement, all court costs, attorney's fees, and other costs and expenses associated with the proceeding must be assessed against the intended parents.

(d) Notwithstanding any other law concerning judicial proceedings or vital statistics, the court shall conduct all hearings and proceedings under this section in camera. The court shall keep all records of the proceedings confidential and subject to inspection under the same standards applicable to adoptions. At the request of any party, the court shall take steps necessary to ensure that the identities of the parties are not disclosed.

(e) The court conducting the proceedings has exclusive and continuing jurisdiction of all matters arising out of the surrogacy until a child born after entry of an order under this section is 180 days old.

SECTION 7. TERMINATION OF SURROGACY AGREEMENT

(a) After entry of an order under Section 6, but before the surrogate becomes pregnant through assisted conception, the court for cause, or

the surrogate, her husband, or the intended parents may terminate the surrogacy agreement by giving written notice of termination to all other parties and filing notice of the termination with the court. Thereupon, the court shall vacate the order entered under Section 6.

(b) A surrogate who has provided an egg for the assisted conception pursuant to an agreement approved under Section 6 may terminate the agreement by filing written notice with the court within 180 days after the last insemination pursuant to the agreement. Upon finding, after notice to the parties to the agreement and hearing, that the surrogate has voluntarily terminated the agreement and understands the nature, meaning, and effect of the termination, the court shall vacate the order entered under Section 6.

(c) The surrogate is not liable to the intended parents for terminating the agreement pursuant to this section.

SECTION 8. PARENTAGE UNDER APPROVED SURROGACY AGREEMENT

(a) The following rules of parentage apply to surrogacy agreements approved under Section 6:

(1) Upon birth of a child to the surrogate, the intended parents are the parents of the child and the surrogate and her husband, if she is married, are not parents of the child unless the court vacates the order pursuant to Section 7(b).

(2) If, after notice of termination by the surrogate, the court vacates the order under Section 7(b) the surrogate is the mother of a resulting child, and her husband, if a party to the agreement, is the father. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].

(b) Upon birth of the child, the intended parents shall file a written notice with the court that a child has been born to the surrogate within 300 days after assisted conception. Thereupon, the court shall enter an order directing the [Department of Vital Statistics] to issue a new birth certificate naming the intended parents as parents and to seal the original birth certificate in the records of the [Department of Vital Statistics].

SECTION 9. SURROGACY: MISCELLANEOUS PROVISIONS

(a) A surrogacy agreement that is the basis of an order under Section 6 may provide for the payment of consideration.

(b) A surrogacy agreement may not limit the right of the surrogate to make decisions regarding her health care or that of the embryo or fetus.

(c) After the entry of an order under Section 6, marriage of the surrogate does not affect the validity of the order, and her husband's consent to the surrogacy agreement is not required, nor is he the father of a resulting child.

(d) A child born to a surrogate within 300 days after assisted conception pursuant to an order under Section 6 is presumed to result from the assisted conception. The presumption is conclusive as to all persons who have notice of the birth and who do not commence within 180 days after notice, an action to assert the contrary in which the child and the parties to the agreement are named as parties. The action must be commenced in the court that issued the order under Section 6.

(e) A health-care provider is not liable for recognizing the surrogate as the mother before receipt of a copy of the order entered under Section 6 or for recognizing the intended parents as parents after receipt of an order entered under Section 6.]

[END OF ALTERNATIVE A]

ALTERNATIVE B

[SECTION 5. SURROGATE AGREEMENTS

An agreement in which a woman agrees to become a surrogate or to relinquish her rights and duties as parent of a child thereafter conceived through assisted conception is void. However, she is the mother of a resulting child, and her husband, if a party to the agreement, is the father of the child. If her husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].]

END OF ALTERNATIVE B]

SECTION 10. PARENT AND CHILD RELATIONSHIP; STATUS OF CHILD

(a) A child whose status as a child is declared or negated by this [Act] is the child only of his or her parents as determined under this [Act].

(b) Unless superseded by later events forming or terminating a parent and child relationship, the status of parent and child declared or negated by this [Act] as to a given individual and a child born alive controls for purposes of:

(1) intestate succession;

(2) probate law exemptions, allowances, or other protections for children in a parent's estate; and

(3) determining eligibility of the child or its descendants to share in a donative transfer from any person as a member of a class determined by reference to the relationship.

SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 12. SHORT TITLE

This [Act] may be cited as the Uniform Status of Children of Assisted Conception Act.

SECTION 13. SEVERABILITY

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 14. EFFECTIVE DATE

This [Act] shall take effect on _____. Its provisions are to be applied prospectively.

SECTION 15. REPEALS

Acts or parts of acts inconsistent with this [Act] are repealed to the extent of the inconsistency.

SECTION 16. APPLICATION TO EXISTING RELATIONSHIPS

This [Act] applies to surrogacy agreements entered into after its effective date.²